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Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video

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I. Introduction

Over the past several years, the Internet has exploded with the growth of user-generated information. In 2004, over fifty-three million people, accounting for forty-four percent of Internet users, uploaded user-created data or videos onto the Internet.[1] One particular video-sharing site, YouTube.com, has over sixty-five thousand videos uploaded by users to it each day.[2] Among these user creations are a new form of digital expression called video mashups. Unlike traditional videos, video mashups take several sources of video and audio and digitally transpose them over each other, thereby creating a video with an entirely different feel and message than the originals.[3] For example, one might combine numerous video shots and audio samples of President George Bush, and mash these together with the tune from John Lennon's *Imagine*.[4] The resulting video mashup would both criticize President Bush and express a message different than the messages in any of the source materials. By creating this video mashup, however, this creator would violate the copyrights belonging to the copyright holders of every piece of source material, unless the creator first obtained permission to use these source materials from the copyright holders.

To the extent that mashups "by definition involve the combination of someone else's information or data" into a new creation, they risk infringing a copyright holder's derivative rights.[5] When an appropriator impinges upon these rights, creators of the source content can request that a service provider remove any copyrighted materials from the provider's website,[6] sue an

1. AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, CONTENT CREATION ONLINE 2 (2004), http://www.pewinternet.org/pdfs/PIP_Content_Creation_Report.pdf.

2. *Two Kings Get Together; Google and YouTube*, ECONOMIST, Oct. 14, 2006, at 82.

3. Sara Kehaulani Goo, *Art and Marketing All Mashed Up*, WASH. POST, Aug. 2, 2006, at D01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/01/AR2006080101134.html.

4. Imagine This: The Video, http://video.google.com/videoplay?docid=-1847778207986315796 (last visited Nov. 4, 2006).

5. Robert S. Gerber, *Mixing It Up on the Web: Legal Issues Arising from Internet "Mashups"*, INTELL. PROP. & TECH. L.J., Aug. 2006, at 11, 12.

6. 17 U.S.C. § 512(c)(1) (2000).

infringer for damages,[7] or even seek criminal prosecution.[8] Instances of copyright holders using such methods have already occurred. In 2004, purported holders to the copyright of Woody Guthrie's song *This Land Is Your Land* threatened suit against Jib-Jab.com, the creator of a web-based animation that used the tune from Guthrie's song to satirize the 2004 presidential election.[9] More recently, online video provider YouTube.com has received numerous requests to remove videos containing copyrighted works.[10] Incidents like these led Prof. Lawrence Lessig to remark that, in terms of remixing video, the "freedom to build upon the film archive of our culture . . . is now a privilege reserved for the funny and famous — and presumably rich."[11]

Even though mashups likely constitute copyright infringement, they nonetheless promote important First Amendment values. Many mashups contain strong political and social criticism.[12] Additionally, mashups give the creator a chance to transform previously existing works, while also giving these works new meaning and relevance. In this way, mashups contribute to the marketplace of ideas. Nevertheless, the United States Supreme Court has largely foreclosed First Amendment protection for mashups by refusing to protect transformative works as a form of fair use.[13]

Changes are necessary to United States copyright law in order to protect the important expression contained within mashups. Mashups, as transformative works that require the imagination of their creator, should be recognized for their contributions to speech, regardless of whether a mashup contains copyrighted material. This comment proposes that courts alter existing fair use doctrines to both find transformation in works such as mashups and give these transformative works a presumption of fair use in order to enhance the First Amendment values mashups embody.

Part II of this comment defines the different genres of mashups that mashup artists are currently creating, while specifically exploring the different types of expression contained in the subset of mashups known as video mashups. Part III examines copyright law, including the broad derivative rights that

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7. *Id.* §§ 504-505.

8. *Id.* §§ 506.

9. Rachel Metz, *Sue You: This Song Is Our Song*, WIRED NEWS, July 29, 2004, http://www.wired.com/news/culture/0,1284,64376,00.html.

10. Yuki Noguchi & Sara Kehaulani Goo, *To the Media, YouTube Is a Threat and a Tool*, WASH. POST, Oct. 31, 2006, at D01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/30/AR2006103001198.html.

11. LAWRENCE LESSIG, FREE CULTURE 107 (2004).

12. *See infra* Part II.B.

13. Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569 (1994).

relate to mashups and why the current fair use doctrine ultimately provides mashups with no protection. Part IV provides an overview of the two leading Supreme Court cases that consider copyright's relation to the First Amendment and discusses why existing First Amendment doctrines are insufficient to protect mashups. Part V considers the various problems, both social and legal, that arise from denying mashups greater protection from the powers copyright holders presently possess. Part VI examines solutions commentators have proposed to solve copyright problems that are similar to the problems mashups face, while also analyzing why those proposed solutions are insufficient to protect the expression in mashups. Part VII proposes that courts alter the traditional fair use test to make the test more accommodating to transformative works. Specifically, courts must find that works that create new expression are transformative, and must give transformative works a presumption of fair use. Part VIII contemplates the benefits of making fair use favor transformation more heavily. This comment concludes with Part IX.

II. The Mashup Breakdown

A. Mishmash of Mashups

In the parlance of netspeak, a mashup is some type of digital media containing "[a] mixture of content or elements."[14] Although relatively new, the term has gained popularity since 2005.[15] Furthermore, while this paper will generally use the term "mashup" to refer to "video mashup," it should be noted that several categories of mashups exist. Regardless of the terminology used, all mashups appropriate "images and sounds from our culture"[16] and transform the meaning of the original sources into something different.

1. Video Mashups

Video mashups have been described as "[mixing] original images or sounds with music, quick-witted narrations or creative transitions. The result is a video dialogue of sorts that makes a statement that is political, personal or merely entertaining."[17] A video mashup need not, however, contain any original material.[18] At its most fundamental level, an author creates a video mashup merely by "taking content from one medium and 'mashing in' content

14. PCMag.com, Mashup Definition, http://www.pcmag.com/encyclopedia_term/0,2542,t=mashup&i=55949,00.asp (last visited Sept. 10, 2007).

15. *Id.*

16. Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 965.

17. Goo, *supra* note 3.

18. *See* Irene E. McDermott, *Movement on My Monitor: Video on the Web*, SEARCHER, Sept. 2006, at 17 (noting that mashups can be made from shots of commercial video).

from another."[19] Thus, one could compose a mashup entirely from pre-existing, unoriginal materials by editing the materials together in an original way.[20] In terms of online video, video mashups follow the "new application of the original thought" that typifies audio remixing and resampling.[21] Indeed, one author recognized this parallel between remixed audio and video mashups by referring to video mashups as "remixed video."[22]

2. Audio Mashups

Audio mashups, also known as music mashups, comprised the original genre of mashups.[23] In their purest form, audio mashups consist of "two or more different songs . . . intermixed and played one atop the other."[24] Though underground disc jockeys, commonly known as D.J.s, have long created mashups, recent mashups have garnered the most media attention.[25] D.J. and producer Brian Burton, known more commonly as DJ Danger Mouse, released a mashup of the Beatle's *White Album* and rapper Jay-Z's *The Black Album* to produce an album aptly named *The Grey Album*.[26] *The Grey Album* took lyrics exclusively from *The Black Album* and layered them over music entirely from the *White Album*, thereby creating an "innovative" sound.[27] Another prominent example combined alternative band Nirvana's *Smells Like Teen Spirit* with music from R&B group Destiny's Child to produce *Smells Like Booty*.[28] Also, the band Negativland achieved notoriety for a lawsuit regarding a Negativland album containing mashed up music from the band U2.[29] Audio mashups such as these continue to gain popularity with the growth of the Internet and the availability of inexpensive digital editing software.[30]

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19. Kris Oser, *Handing Ad Reins to Consumers Is Risky Business*, ADVER. AGE, Apr. 10, 2006, at 58.

20. *See id.* (noting that mashups can combine content from television shows, home movies or video ads).

21. Goo, *supra* note 3, at D01.

22. Lessig, *supra* note 16, at 965.

23. Oser, *supra* note 19, at 58.

24. Aliya Sternstein, *Mashups*, FORBES, July 21, 2003, at 145.

25. Derek Chezzi, *Tech: Feel Free to Mix and Mash*, MACLEAN'S, Sept. 20, 2004, at 81, *available at* http://www.macleans.ca/science/technology/article.jsp?content=20040920_88764_88764.

26. Ben Greenman, *The Mouse That Remixed*, NEW YORKER, Feb. 9, 2004, at 24, *available at* http://www.newyorker.com/archive/2004/02/09/040209ta_talk_greenman; Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 987 (2004).

27. Greenman, *supra* note 26, at 24.

28. Hunter & Lastowka, *supra* note 26, at 987.

29. Rick Poynor, *Fair Game*, PRINT, Sept.-Oct. 2001, at 50; *see also* Negativland, *Two Relationships to a Cultural Public Domain*, 66 LAW & CONTEMP. PROBS. 239, 239 (2003).

30. *See, e.g.*, Hunter & Lastowka, *supra* note 26, at 987-88.

3. Software-based Mashups

Individuals may also construct mashups entirely based on software. As with music mashups, software mashups also combine several sources into a new product.[31] Software companies, such as IBM, define software mashups as "applications that use open technologies . . . to combine content from more than one source into a single application."[32] For example, programmer Paul Rademacher combined information from the classified advertising website Craigslist.com with Google's online map search to produce a website where available rentals "appear as virtual pushpins on maps [in] nearly three-dozen regions" around Silicon Valley.[33] Another site "overlays [Chicago] crime stats onto Google Maps so you can see what crimes were committed recently in your neighborhood."[34] Finally, one developer combined "Yahoo! Inc.'s . . . real-time traffic data with Google Maps" to allow individuals to track highway congestion.[35] These software mashups emulate the genre of video mashups by combining multiple sources to create something different than the component parts.

4. Hybrid Mashups

Many mashups defy these categorizations. Indeed, these hybrid mashups often combine the elements of a video mashup and a music mashup. For example, radio disc jockey Ben Bill combined various video and audio elements from Green Day's *Boulevard of Broken Dreams*, Oasis's *Today*, Travis's *Writing to Reach You*, and Eminem's *Sing for the Moment* to form the mashup *Boulevard of Broken Songs*.[36] The resulting mashup music video fluidly moves from one song and music video to another.

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31. Gerber, *supra* note 5, at 11.

32. Heather Havenstein, *IBM Offers Prototype for Building 'Mashup' Apps*, COMPUTERWORLD, June 26, 2006, at 18, *available at* http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=111603.

33. Robert D. Hof, *Mix, Match, and Mutate*, BUSINESSWEEK ONLINE, July 25, 2005, http://www.businessweek.com/@@76IH*ocQ34AvyQMA/magazine/content/05_30/b3944108_mz063.htm.

34. *Id.*

35. *Id.*

36. Aidin Vaziri, *A DJ's 'Mash-up' of Sound-alike Tunes by the Likes of Green Day Is Getting Mad Airplay — and No One's Sued Yet*, S.F. CHRON., May 3, 2005, at E1. The mashup is available on numerous websites. *See, e.g.*, Boulevard of Broken Songs, http://www.youtube.com/watch?v=j7bTcKzn-zM (last visited Sept. 28, 2007).

B. Mashups in the Express(ion) Lane of the Information Superhighway

Many of the copyright issues that exist with video mashups arise with every type of mashup.[37] This comment, however, will focus primarily on video mashups and mashups that contain at least some video elements. The reasons for this are two-fold. First, video mashups have become extremely popular on the Internet. Sites such as YouTube.com host thousands of mashup videos.[38] Further, a search at Google for "video mashup" yields approximately one hundred eight thousand results.[39] Accordingly, one commentator noted that the Internet has seen an "explosion" of video mashups within the past few years.[40] While other types of mashups enjoy popularity, the tremendous volume and popularity of video mashups warrants further discussion.

Second, video mashups have the ability to carry messages that may be lacking in other types of mashups. While certainly requiring creativity to make, software mashups constitute "tools" rather than a vehicle for commentary or entertainment.[41] Video mashups, however, often serve the purpose of expressing "critical commentary," or "artistic" or "political" messages.[42] Video mashups allow people to create a new kind of speech that they would not otherwise have the ability to express if they could not combine these pieces of already existing video and audio.[43] Nevertheless, the creation of video mashups remains illegal unless the mashup creator obtains permission from the copyright holders of the original materials.[44] By proscribing video mashups, the current intellectual property regime may serve to thwart vital First Amendment values in the entertainment, social, and political contexts.

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37. For example, DJ Danger Mouse never received permission from any of the original copyright holders of either the *White Album* or *The Black Album*. Greenman, *supra* note 26, at 24. Many software mashup creators do not seek the permission of website owners whose data is being used. Hof, *supra* note 33. At least one commentator has noted that mashing up copyrighted materials without the copyright holder's permission is "presumptively illegal under the law as it stands." Lessig, *supra* note 16, at 965.

38. YouTube, http://www.youtube.com (search for "mashup") (last visited Sept. 28, 2007).

39. Google, http://www.google.com (search for "video mashup") (last visited Sept. 28, 2007).

40. *See* Lessig, *supra* note 16, at 965.

41. Elinor Mills, *Mapping a Revolution with 'Mashups'*, CNET NEWS.COM, Nov. 17, 2005, http://news.com.com/2009-1025-5944608.html.

42. Lessig, *supra* note 16, at 965; *see also* Goo, *supra* note 3.

43. *See* Lessig, *supra* note 16, at 964.

44. *See infra* notes 64-65 and accompanying text.

1. Entertainment Expression in Mashups

Largely for entertainment purposes, many video mashups integrate elements from popular movies and television. One such mashup combines scenes from George Lucas's *Star Wars* with the "Black Knight" scene from *Monty Python and the Holy Grail*. The scene combines dialogue from both of these movies over scenes from *Holy Grail*, while also showing the knights fighting with lightsabers instead of swords.[45] Another mashup, *StarLords*, mimics a movie trailer by imagining what it would be like if a director combined the worlds in *Star Wars* and *Lord of the Rings* in the same movie.[46] After the various battle scenes, the mashup climaxes with a rendition of Jimmy Castor's disco hit, *It's Just Begun*.[47] According to *StarLords*' creator, "[*StarLords*] juxtaposes similar pieces of familiar media structures. It experiments with sampling what is normally seen in entirety and in context (the films) and then linking them in time and space to a popular music track . . . ."[48] This type of popular culture sampling can create mashups that contrast starkly with some of the original content. One such mashup, *Peanutface*,[49] combines video of Charles Shultz's *Peanuts* characters, which are viewed as innocent and able to "generate positive feelings,"[50] with dialogue from the movie *Scarface*, notorious for its repeated use of vulgar language.[51] Though lacking in what some would consider serious political or social commentary, people value such mashups for their entertainment value and ability to give new meaning to already existing materials.[52]

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45. *See* Monty Python — Black Knight (Star Wars), http://www.youtube.com/watch?v=leEsz9ci5XE (last visited Sept. 28, 2007).

46. *See* Star Lords, http://www.youtube.com/watch?v=ATpv7KEUZQQ (last visited Sept. 28, 2007).

47. *Id.*

48. Misshapen Features, http://www.misshapenfeatures.com/starlords.php (last visited Sept. 10, 2007).

49. Peanutface, http://www.ifilm.com/video/2745736 (last visited Sept. 28, 2007).

50. *More than 'Peanuts' at Stake with MetLife Branding*, BANK ADVER. NEWS, Mar. 6, 2000, at 1.

51. Eric Vanatta, *But Cf. . . . : The F-Motion*, 21 CONST. COMMENT. 285, 287 (2004) ("Some movies such as Scarface . . . are known for the extensive use of the family of Fuck words . . . .").

52. *See, e.g.*, Lessig, *supra* note 16, at 965 (noting that much of the commentary in mashups is "awful, but some [is] brilliant"); *see also* Note, *"Recoding" and the Derivative Works Entitlement: Addressing the First Amendment Challenge*, 119 HARV. L. REV. 1488, 1488 (2006) (noting that mixing copyrighted material allows for "new expression in a way that ascribes a different meaning to [the original work] than intended by [the original work's] creator").

2. Social Expression in Mashups

Alongside their entertainment value, many mashups also contain potent social commentary dealing with current events. In these mashups, the creators piece together materials in a way that critiques a character appearing in the mashup or some other element of society. Recently, Mel Gibson's arrest and subsequent comments concerning people of the Jewish faith provided fodder for mashup creators. Taking clips from the movie *Signs*, in which Gibson starred, as well as spoken Yiddish, a movie clip featuring Woody Allen, and Adam Sandler's *The Hanukkah Song*, one mashup creator pieced together *Mel Gibson's Signs of Anti-Semitism*.[53] Throughout the mashup, the creator depicted Gibson as both fearful and excessive in his response to a perceived threat posed by members of the Jewish faith.[54] The title of the mashup and its content leave little doubt that the creator feels that Gibson harbors anti-Semitic beliefs.

Following Kanye West's criticism of President Bush after Hurricane Katrina,[55] creators rushed to forge West's comments into a mashup. Combining West's quote, "George Bush doesn't care about black people," West's song *Gold Digger*, the *Gold Digger* music video, and video of post-Katrina New Orleans, two groups called The Black Lantern and The Legendary KO created the mashup *George Bush Doesn't Care About Black People*.[56] In this mashup, the creators change West's *Gold Digger* lyrics to reflect the situation in New Orleans.[57] One of the mashup's creators stated that he felt the "safety and well-being of all people should always be considered first, and we felt compelled to express that through song."[58] By recasting West's work to convey their opinions on President Bush's handling of Hurricane Katrina, these mashup artists transformed existing materials to relay their own beliefs.

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53. Mel Gibson's Signs (of Anti-Semitism), http://www.youtube.com/watch?v=8ae_Kskfw6c (last visited Sept. 28, 2007).

54. *Id.*

55. Lisa de Moraes, *Kanye West's Torrent of Criticism, Live on NBC*, WASH. POST, Sept. 3, 2005, at C01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090300165.html.

56. *See* The Black Lantern, http://www.theblacklantern.com/george.html (last visited Sept. 28, 2007); The Legendary KO, http://www.k-otix.com/index.php?option=com_content&task=view&id=43&Itemid=2 (last visited Sept. 30, 2006).

57. The Black Lantern, *supra* note 56. Such lines include "peoples lives on the line, you declining to help" and "black folks gotta hope, gotta wait and see if FEMA really comes through in an emergency." *Id.*

58. Terrie Albano, *In the Wake of Katrina — Political Songs Zoom Over the Net*, PEOPLE'S WKLY. WORLD, Sept. 24, 2005, http://www.pww.org/article/view/7787/1/287.

3. Political Expression in Mashups

Finally, video mashups may also contain strong political messages. A mashup that first appeared on the Internet several years ago showed numerous clips of President Bush and British Prime Minister Tony Blair in a way that made them appear to sing the Lionel Ritchie/Diana Ross duet *Endless Love* to each other.[59] One observer viewed this mashup as "commentary on Anglo-American cooperation in launching and prosecuting the war in Iraq"[60] and the close relationship that developed between Bush and Blair in the process. Another mashup contained audio clips from Sen. Ted Stevens's infamous "series of tubes" speech regarding regulation of the Internet.[61] This mashup combined the audio of the speech with video appearing to originate from the 1950's showing vacuum tubes and antiquated computer equipment, as if to suggest Stevens's views of the Internet are equally antiquated and that he displays what others have described as a "startling technological ignorance."[62] Similar examples of how such political commentary can be woven into mashups abound. As with other mashups, the mashup creator takes existing materials and recombines them in a way to create a new message that differs from the content present in the source materials. As a vehicle for conveying this type of commentary, the potential of such mashups "is just beginning to be glimpsed."[63]

While mashups provide creators a new way to combine images from our culture to produce new messages, mashup creation, in many instances, violates the copyrights of the authors of the original materials.[64] This occurs because most mashups contain at least some previously copyrighted work, and because the mashup creators seldom seek or receive permission from the copyright holders.[65] While these barriers have not stopped some individuals from creating mashups,[66] such illegalities increase the costs associated with

59. *See* About.com, Bush and Blair Sing Endless Love, http://politicalhumor.about.com/cs/bushmultimedia/v/blendlesslove.htm (last visited Sept. 28, 2007).

60. R. Anthony Reese, *The Problems of Judging Young Technologies*, J. INTERNET L., Dec. 2005, at 15.

61. Dan Mitchell, *Tail Is Wagging the Internet Dog*, N.Y. TIMES, July 8, 2006, at C5. A partial transcript and the audio of Stevens's speech can found online as well. Wired Blogs: 27B Stroke 6 (June 30, 2006), http://blog.wired.com/27bstroke6/2006/06/your_own_person.html?entry_id=1512499.

62. J. Scott Orr, *Technically Speaking, These Guys Are Morons*, TIMES-PICAYUNE (New Orleans, La.), Aug. 20, 2006, at 7.

63. Lessig, *supra* note 16, at 965.

64. *See* Hunter & Lastowka, *supra* note 26, at 988; Lessig, *supra* note 16, at 965; *see also infra* Part II.A, B.2.

65. *See* Hunter & Lastowka, *supra* note 26, at 988 n.152.

66. *See* Greenman, *supra* note 26, at 24 (noting that none of the samples used on *The Grey*

producing mashups.[67] These costs, including both the financial costs of purchasing rights and the opportunity costs of investing time and effort to secure permission for a non-profit mashup, restrict the potential of mashups as a tool for commentary by deterring many individuals from creating mashups.[68] Because this comment argues for a change in copyright law that would enhance First Amendment values by expanding the marketplace of ideas, an understanding of current copyright law in the United States is necessary.

III. Copyright Law

The U.S. Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[69] This provision grants Congress the authority to define the contours of copyright law.[70] In accordance with this authority, Congress enacted the 1976 Copyright Act, which granted authors "exclusive rights" over works they create.[71] These exclusive rights include the right "to reproduce the copyrighted work,"[72] "to distribute copies . . . of the copyrighted work to the public by sale,"[73] and "to prepare derivative works based upon the copyrighted work."[74] This expansive right to create derivative works figures prominently into the current debate concerning mashups, especially regarding the debate over how fair use might be used to temper an author's derivative works right.

A. The Expansive Derivative Works Right

The 1976 Copyright Act defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work

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Album were legally cleared); Lessig, *supra* note 16, at 965 (noting that the creator of the Bush/Blair *Endless Love* clip sought permission to use the song, but permission was denied).

67. *See* Lessig, *supra* note 16, at 966, 969.

68. *Id.* at 965-66.

69. U.S. CONST. art. I, § 8, cl. 8.

70. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work . . . .").

71. 17 U.S.C. § 106 (2000).

72. *Id.* § 106(1).

73. *Id.* § 106(3).

74. *Id.* § 106(2).

may be recast, transformed, or adapted."[75] Courts have interpreted the definition expansively. In addition to encompassing things like movie versions of a book[76] or a sequel to a novel,[77] courts have extended derivative rights to cover unique characters in cartoons or novels,[78] three-dimensional figures based on two-dimensional art,[79] sculptures inspired by a picture,[80] and digital samples used by rap artists from old pop songs.[81] This broad definition has led one commentator to observe that "any work that incorporates a portion of a copyrighted work in some form presumably falls within the statutory definition of a 'derivative work.'"[82] In addition, "[c]ourts have given little guidance as to the quantum of similarity . . . necessary to become liable for copyright infringement."[83] As a result, taking even "a very small amount of expression from a copyrighted work" may result in copyright infringement for violating the derivative works right.[84] Therefore, the derivative works right encompasses not only full reproduction of a copyrighted work,[85] but also materials that appropriate even minor elements from copyrighted works.[86]

75. *Id.* § 101.

76. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1274 (11th Cir. 2001) (noting that the "famous movie" *Gone with the Wind* was a derivative work based on the book *Gone with the Wind*); *see also* Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 326 (2005).

77. *See, e.g.*, *Suntrust*, 268 F.3d at 1274 (holding that the book *Scarlett: The Sequel* was a derivative work based on the book *Gone with the Wind*).

78. *See, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 754-55 (9th Cir. 1978) (holding that comic book characters are protectable under copyright law).

79. *See, e.g.*, Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 908-09 (2d Cir. 1980) (holding that plastic toys based on drawings of Disney characters are derivative works).

80. *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 312 (2d Cir. 1992) (holding that the sculpture based on a picture of some puppies was a derivative work).

81. *See, e.g.*, Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (finding defendants' sampling of copyrighted work to display a "callous disregard" for the rights of the copyright holder).

82. Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1218 (1997).

83. *Id.* at 1220.

84. *Id.*

85. *See* Abramowicz, *supra* note 76, at 334 ("[T]he tests for violation of the derivative right and violation of the reproduction right are themselves almost redundant."). This comment assumes that works that involve some transformation should be classified as derivative works, even if they could also arguably be classified as reproductions. This comment also assumes that reproduction rights will be narrowly classified to full reproduction or only "trivial" changes in the copyrighted work.

86. Erin E. Gallagher, *On the Fair Use Fence Between Derivative Works and Allegedly Infringing Creations: A Proposal for a Middle Ground*, 80 NOTRE DAME L. REV. 759, 763-68 (2005) (noting courts have found the creation of a derivative work in borrowing "fringe elements" from a previous copyrighted work).

Courts interpret derivative works rights broadly because these rights, in theory, serve to increase the amount of works available to the public by promising authors the opportunity for greater financial rewards.[87] Proof of the existence of such incentives, however, is lacking, even though derivative works rights remain in effect and make the creation of most mashups illegal.

1. Derivative Works Rights May Not Promote Creation

Though courts assume that derivative rights give authors the incentive to create more works,[88] one commentator has questioned whether derivative works rights actually provide any meaningful incentive.[89] Other commentators have gone so far as to suggest that the derivative works right may actually decrease the total amount of expression available in the marketplace.[90] Such an assertion seems plausible, given that the current derivative works entitlement was not present in copyright law prior to the 1976 Copyright Act.[91] Despite the lack of robust derivative works protection prior to that time, substantial evidence exists that authors still felt the incentives to create.[92] In

87. *See* Abramowicz, *supra* note 76, at 327 ("[T]he derivative right could lead someone who otherwise would not have created a copyrighted work to create one."); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S. 209, 216 (1983) (noting that derivative rights "enable[] prospective copyright owners to proportion their [creative] investment in a work's expression to the returns expected not only from the market in which the copyrighted work is first published, but from other, derivative markets as well"); *cf*. Eldred v. Ashcroft, 537 U.S. 186, 213 n.18 (2003) ("[T]he economic philosophy behind the Copyright Clause is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." (citing Mazer v. Stein, 347 U.S. 201, 219 (1954))); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1274 (11th Cir. 2001) (noting an unauthorized derivative work could hurt the potential market of the original work).

88. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).

89. Alan L. Durham, *Consumer Modification of Copyrighted Works*, 81 IND. L.J. 851, 884 (2006) (noting that where derivative rights have been violated "the injury to the copyright owner is debatable").

90. Abramowicz, *supra* note 76, at 330 ("It thus seems unlikely that the derivative right encourages the creation of more works than it discourages."); Voegtli, *supra* note 82, at 1243 ("[D]erivative rights may actually reduce the production of expressive works because they inhibit creation of appropriative works by raising their production cost.").

91. Voegtli, *supra* note 82, at 1237. Prior to the passage of the 1976 Copyright Act, both statutory and judge-made derivative rights were slow to develop. *See id.* at 1233-37. The 1976 Copyright Act brought derivative works to their broadest, most expansive point to date. *Id.* at 1237.

92. For example, despite no entitlement to a derivative right covering translations, Harriet Beecher Stowe still wrote *Uncle Tom's Cabin*. In a dispute involving whether a German translation violated Stowe's copyright, the court found Stowe had no right to prohibit

fact, during 1975, the year immediately preceding the enactment of the statutory derivative right, authors filed over 300,000 copyright registrations.[93] Further, authors filed a minimum of 100,000 copyright registrations in nearly every year between 1910 and 1975.[94] In all, authors filed over twelve million copyright registrations in the sixty-five years preceding the enactment of statutory derivative rights.[95] Yet, despite this evidence and the lack of any empirical study proving that derivative rights actually serve as an incentive for creation,[96] the 1976 Copyright Act and the courts continue to define derivative rights broadly.[97]

2. Mashups Likely Violate Derivative Works Rights

Under the Copyright Act's sweeping definition of derivative works, the creation of most mashups constitutes a violation of copyright law. This occurs because most mashups are created either partially or entirely from copyrighted works.[98] While mashups may be viewed as violating reproduction rights,[99] mashups do not constitute a pure "reproduction," because fundamentally, mashups in some way transform the original works. This makes mashups more of a derivative work than a reproduction.[100] It does not matter if the mashup artist targets a different market than the original author, or if the mashup contains an entirely different message than the original material. If the

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unauthorized translations, even going so far as to note that "translation enhances the value of the original." *See generally* Stowe v. Thomas, 23 F. Cas. 201, 206 (C.C.E.D. Pa. 1853) (No. 13,514).

93. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 496 fig.1 (2004).

94. *Id.*

95. *Id.* The number of copyrights filed is arrived at by analyzing the data in the graph. The data estimates break down as follows: 1910-19, approximately 1 million registrations; 1920-29, approximately 1.5 million registrations; 1930-39, approximately 1.5 million registrations; 1940-49, approximately 2 million registrations; 1950-59, approximately 2 million registrations; 1960-69, approximately 2.5 million registrations; 1970-75, approximately 1.5 million registrations. *Id.*

96. Abramowicz, *supra* note 76, at 330.

97. Voegtli, *supra* note 82, at 1237.

98. *See* N'gai Croal, *Technology: Time for Your Mashup?*, NEWSWEEK, Mar. 6, 2006, at 61 (noting that "[v]ideo mashups also tend to be unauthorized").

99. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 50 (2002) ("Under present law, the copyright owner's 'reproduction right' . . . is viewed as already encompassing much of what would otherwise be covered by the 'derivative works right.'").

100. *See* 17 U.S.C. §§ 101, 106 (2000) (granting authors derivative and reproduction rights, and stating a derivative right involves transformation); Rubenfeld, *supra* note 99, at 51 (noting "the reproduction right is supposed to be violated only when an infringer reproduces 'the copyrighted *work*,'" not just elements from the work).

mashup artist uses copyrighted material, then the mashup artist has probably violated the original author's derivative rights.[101] Given the wide scope of protection that derivative rights offer copyright holders, a mashup creator is often left with only one defense for the appropriation of copyrighted material in their creations: fair use.[102]

B. The Fair Use Defense Is No Defense for Mashup Creators

To avoid the rigid application of copyright law and the potential stifling of "the very creativity which [copyright] law is designed to foster,"[103] the 1976 Copyright Act incorporated a "fair use" limitation on an author's powers under copyright.[104] The United States Supreme Court defined fair use as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[105] Although first codified in the 1976 Copyright Act, fair use existed as a "judge-made doctrine until the passage of the 1976 Copyright Act."[106] The reason for the doctrine's creation was that fair use was "thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'"[107] As Justice Story recognized in 1845, "[T]here are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow . . . ."[108]

Thus, fair use recognizes that there is little in the arts or literature that does not rely on previous works for its creation. In order to promote creativity, the law must insure not only that authors do not have "absolute rule" over their works,[109] but that subsequent authors and creators can borrow from these works to at least a limited degree.[110] The 1976 Copyright Act simultaneously

101. Voegtli, *supra* note 82, at 1227, 1231 (noting neither market effect nor the transformative nature of the new work can save it from being deemed a derivative work).

102. *Id.* at 1237.

103. Stewart v. Abend, 495 U.S. 207, 236 (1990) (citing Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980)).

104. 17 U.S.C. § 107.

105. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (quoting HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)) (internal quotation marks omitted).

106. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994).

107. *Id.* at 575 (citing U.S. CONST. art. I, § 8, cl. 8).

108. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

109. Stewart v. Abend, 495 U.S. 207, 236 (1990).

110. *Cf. Harper & Row*, 471 U.S. at 548-49 (noting that although fair use allows for materials to be used without an author's permission, copying between three hundred and four hundred words was not a fair use).

codified fair use to insure this goal and set forth the elements that constitute fair use.

1. Statutory Factors of Copyright

The 1976 Copyright Act (the Act) gives several examples of activities that could be considered fair use, including "criticism, comment, news reporting, teaching, . . . scholarship, or research," while also expressly noting that such activities are "not an infringement of copyright."[111] The Court has noted that such examples provide only "general guidance,"[112] and that Congress had "not intended [the list] to be exhaustive."[113] To determine fair use, the Act lists four factors that courts must consider.[114] First, courts must assess "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[115] This factor acts to ascertain if the new work merely supersedes the original creation, "or instead adds something new, with a further purpose or different character, altering the first with new expression meaning or message."[116] Put another way, this factor asks to what degree "the new work is 'transformative.'"[117] Since the goal of copyright is to promote new creations, "the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use."[118]

Second, courts must examine "the nature of the copyrighted work."[119] The nature of the work describes how original the work's expression is.[120] Primarily, "[t]his factor calls for recognition that some works are closer to the core of intended copyright protection than others."[121] A potential infringer cannot claim fair use as easily when the source work approaches this core.[122] A work must contain "original [] creative expression,"[123] not just a simple recitation of factual information, to be close to copyright's core purpose.[124]

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111. 17 U.S.C. § 107 (2000).

112. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

113. *Harper & Row*, 471 U.S. at 561.

114. 17 U.S.C. § 107 (stating that in determining if any use of copyrighted material is fair, "the factors to be considered *shall* include" (emphasis added)).

115. *Id.* § 107(1).

116. *Campbell*, 510 U.S. at 579.

117. *Id.*

118. *Id.*

119. 17 U.S.C. § 107(2).

120. *Campbell*, 510 U.S. at 586.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.* (finding original works by music artist Roy Orbison fall within the "core" of

This prohibition exists because factual information is often "so integral to the idea expressed as to be inseparable from it," and thus, does not contain enough originality to overcome a fair use defense.[125] One may only claim fair use regarding "original" works when the copying is necessary to convey a message.[126]

Third, courts must weigh "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[127] This factor also reconsiders the "purpose and character" of the use of the appropriated copyrighted materials.[128] Thus, depending on the copying's purpose, copying an entire copyrighted work may not weigh against a finding of fair use,[129] whereas the copying of only a few hundred words from a novel may.[130] Principally, the third factor examines the justification for the amount of material copied.[131] To consider this factor, courts weigh both the amount of expression copied as well as the significance of the materials taken from the original copyrighted work.[132] Because incorporating a large amount of copyrighted work "may reveal a dearth of transformative character or purpose under the first factor," courts are likely to find "a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original" and not protected by fair use.[133]

Fourth, courts must consider "the effect of the use upon the potential market for or value of the copyrighted work."[134] This factor "is undoubtedly the

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copyright); *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) (noting the "need to disseminate factual works" is greater, making it less likely copyright's core protections apply).

125. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

126. *See Campbell*, 510 U.S. at 586 (finding that "parodies almost invariably copy publicly known, expressive works" but can still be a fair use).

127. 17 U.S.C. § 107(3) (2000).

128. *Campbell*, 510 U.S. at 587.

129. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984) (finding the copying of entire television programs onto a video tape does not necessarily weigh against fair use if done for private purposes).

130. *See Harper & Row*, 471 U.S. at 565-66 (finding that the copying of several hundred words from Gerald Ford's novel copied "the most powerful" parts of the novel and thus such copying was not a fair use).

131. *Campbell*, 510 U.S. at 586.

132. *See id.* at 587 ("The Court of Appeals is of course correct that this factor calls for thought not only about the quantity of the materials used, but also about their quality and importance, too."); *Harper & Row*, 471 U.S. at 564-66 (examining the amount of material taken in both its "absolute terms" and its "qualitative nature").

133. *Campbell*, 510 U.S. at 587-88.

134. 17 U.S.C. § 107(4) (2000).

single most important element of fair use."[135] The effects and value test examines the harm on the actual and potential markets for not only the original work, but derivative works as well.[136] Moreover, this test considers the effects that would occur on the potential market if the potentially infringing conduct should become widespread.[137] Generally, the more harm that comes to the market for a copyrighted work, the less likely it is that a court will find fair use.[138] Even so, the Court found that fair use might exist in limited instances even when copying a work "kills demand for the original."[139]

Theoretically, fair use presents a strong defense to copyright infringement. The section of the Act containing fair use specifically mandates that it applies "notwithstanding" any of the rights granted under section 106 of the Act.[140] Section 106 also states that the rights granted are "[s]ubject to" fair use rights granted in the Act.[141] Additionally, the four factors listed in the Act are not exclusive, for the courts may consider other relevant factors if they find them important.[142] Furthermore, courts do not consider the four factors in isolation, but rather, consider them together, and courts can weight each factor as they deem appropriate.[143] This framework gives courts considerable discretion to assign the factors different weights when appropriate, and to find an otherwise infringing work to constitute a fair use. The Supreme Court has done so, most notably by finding a potentially infringing work to be protected as a parody.[144] In defining this fair use, however, the Court stopped short of imbuing works like mashups with the same protections that parodies receive.[145] To understand

135. *Harper & Row*, 471 U.S. at 566.

136. *Id.* at 568.

137. *Campbell*, 510 U.S. at 590; *Harper & Row*, 471 U.S. at 568 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

138. *See Harper & Row*, 417 U.S. at 567-69 (finding that because the material was copied from an unpublished novel, the market was more likely to be adversely affected and fair use was less likely to be found).

139. *Campbell*, 510 U.S. at 592 (noting things like criticism and parody, though likely harmful to a work, might not weigh against fair use).

140. 17 U.S.C. § 107 (2000).

141. *Id.* § 106.

142. *See Harper & Row*, 471 U.S. at 560 ("The factors enumerated in the section [explaining fair use] are not meant to be exclusive . . . ."); *see also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 20-21 (2001) (explaining the 1976 Copyright Act requires courts to examine the "four statutory factors plus any other factor the court deems appropriate" in determining fair use).

143. *Campbell*, 510 U.S. at 578 (noting the four statutory factors may not "be treated in isolation, one from another," and that the factors must "be explored, and the results weighed together, in light of the purposes of copyright").

144. *Id.* at 594.

145. *Id.* at 580-81.

why the Court did not extend fair use protection to works like mashups, the following subparts examine the Court's differentiation between parody and satire.

2. Fair Use and Parodies

In *Campbell v. Acuff-Rose Music, Inc.*, the U.S. Supreme Court considered whether the rap group 2 Live Crew's commercial use of portions of Roy Orbison's song, *Oh, Pretty Woman*, constituted fair use.[146] 2 Live Crew conceded that their use of Orbison's material infringed Orbison's copyright "but for a finding of fair use through parody."[147] Per section 107 of the Act, the Court first examined the "purpose and character" of the alleged infringing use to determine if parody was a transformative use.[148] The Court had noted that the reason for determining the purpose and the character of the infringing work was to determine if the work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[149] The Court also stated that such transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."[150] The more transformative a work is, the Court reasoned, "the less will be the significance of other factors" that could weigh against finding fair use.[151] The Court held that parody was transformative, stating:

> Suffice it to say now that parody has an obvious claim to transformative value . . . . Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107 [of the Copyright Act].[152]

Because the Court held parodied work to be transformative, 2 Live Crew's song could constitute a fair use. Transformative works possess this ability because they do more than merely "supersede" the original creation. Rather, transformative works serve to further copyright's goal of promoting science

146. 510 U.S. 569.
147. *Id.* at 574.
148. *Id.* at 578-79; *see also* 17 U.S.C. § 107 (2000).
149. *Campbell*, 510 U.S. at 579.
150. *Id.*
151. *Id.*
152. *Id.*

and the useful arts.[153] This analysis seems to not only create a broad fair use right, but also usurp part of the derivative works right by making transformation an exception to the derivative works right.[154] Although this analysis suggests sweeping protections for transformative works, the Court limited this protection to parody. Consequently, a satirist could not use transformation to overcome the derivative works right.

3. Unfair Use and Satire

In *Campbell v. Acuff-Rose Music, Inc.*, the Court outlined a distinction between parody and satire, offering only the former significant protection as a fair use.[155] The Court defined parody as a work that, "at least in part, comments on [the original] author's work."[156] A satire, on the other hand, is "a work 'in which prevalent follies or vices are assailed with ridicule.'"[157] Put another way, parody targets the copyrighted work, while a satire uses the copyrighted work to take aim at some other target.[158] The Court largely excluded satire from receiving the same fair use protections that parody received as a transformative work. The Court held that if "the commentary has no critical bearing on the substance or style of the original composition" and is used merely to get attention, then "the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish)."[159] The Court distinguished parody and satire because "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[160]

As a result of this decision, parodies that in some way criticize the original work gain more of a protected status, as the Court determined parodies to be intrinsically transformative.[161] This means that a parody creator need not prove as strong of a showing for the other factors of fair use.[162] Satires, on the other hand, are viewed with judicial suspicion and require "justification" for the borrowing.[163] This result has caused courts to find a lack of fair use when

153. *Id.*

154. *See* 17 U.S.C. §§ 101, 106 (2000) (defining a derivative work as "any other form in which a work may be . . . transformed").

155. 510 U.S. 569.

156. *Id.* at 580.

157. *Id.* at 581 n.15 (citing 14 OXFORD ENGLISH DICTIONARY 500 (2d ed. 1989)).

158. Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997).

159. *Campbell*, 510 U.S. at 580.

160. *Id.* at 580-81

161. *Id.*

162. *See generally Campbell*, 510 U.S. 569.

163. *Id.* at 580-81.

a creator used satire in an arguably transformative work, simply because the satire did not criticize the original work. In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, the Ninth Circuit had to determine if a book lampooning the O.J. Simpson murder trial using elements from *The Cat in the Hat* constituted fair use.[164] The book in question, *The Cat NOT in the Hat!*, "broadly mimic[ed] Dr. Seuss' characteristic style."[165] The court, however, held that *The Cat NOT in the Hat!* simply retold Simpson's saga, and "[did] not hold [Seuss'] style up to ridicule"[166] or have "'critical bearing on the substance or style of' *The Cat in the Hat*."[167] Although the author of *The Cat NOT in the Hat!* placed Simpson in a world distinct from those Seuss created, and used the story to tell a tale of murder and a subsequent criminal trial,[168] the Ninth Circuit still concluded that "[b]ecause there is no effort to create a transformative work with 'new expression, meaning, or message,' the infringing work's commercial use further cuts against the fair use defense."[169]

4. Effects of the Parody-Satire Distinction

The *Dr. Seuss* decision "draw[s] a definitive line between protected parody and unprotected satire," by judging satire to contain "no relevant transformation."[170] The Ninth Circuit presumed satire to be non-transformative because it viewed satire as a lazy creator's way to "avoid the drudgery in working up something fresh,"[171] rather than something that adds "new expression, meaning, or message."[172] Many criticize the fact that courts view satire in this manner, given the difficulty in determining what constitutes a parody or satire.[173] In fact, one court seems to have confused the parody-

164. 109 F.3d 1394 (9th Cir. 1997).

165. *Id.* at 1401.

166. *Id.* (emphasis omitted).

167. *Id.* (quoting *Campbell*, 510 U.S. at 580).

168. *Id.*; *see also* Gallagher, *supra* note 86, at 767 (noting the plaintiff in *Dr. Seuss Enterprises* "sought an injunction precisely because the irreverent, satirical critique of the Simpson trial and events surrounding it did *not* match the innocent, whimsical style of the Dr. Seuss collection").

169. *Dr. Seuss Enters.*, 109 F.3d at 1401 (quoting *Campbell*, 510 U.S. at 579).

170. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1585-86 (2004).

171. *Campbell*, 510 U.S. at 580.

172. *Id.* at 579.

173. Jason M. Vogel, Note, *The Cat in the Hat's Latest Bad Trick: The Ninth Circuit's Narrowing of the Parody Defense to Copyright Infringement in* Dr. Seuss Enterprises v. Penguin Books USA, Inc., 20 CARDOZO L. REV. 287, 312-13 (1998). Even the United States Supreme Court acknowledged in *Campbell* that it is difficult for judges to determine what constitutes parody. *Campbell*, 510 U.S. at 581.

satire terminology.[174] Similarly, characters and styles appropriated from original works have been found to be satire in one instance,[175] and protected parody in another.[176] Some observers have noted that this seemingly arbitrary distinction allows judges to find parody when it suits the results they wish to achieve.[177] Commentators have also stated that satires must be transformative in order for audience members to appreciate the incongruities that give satire its message.[178] Given such a gray area between the two, distinguishing satire as non-transformative seems to ignore the fact that satires, like parodies, necessarily alter the meaning of the original work. By adding this new expression to an already existing work, satires transform the original work into something new.[179]

What further confuses the parody-satire distinction is that while courts consider satire non-transformative, works that constitute neither parody nor satire have been found transformative. In *Kelly v. Arriba Soft Corp.*, the Ninth Circuit held that "thumbnail" images used by an Internet search engine were full copies of the original works.[180] The court, however, also held that even though the images were copies, they were sufficiently transformative to be considered a fair use, because Arriba used the fully reproduced images as a "tool" rather than for "aesthetic" purposes as Kelly had originally done.[181] Although Arriba fully copied the images and did not add new expression, meaning, or message to them, because Arriba "created a different purpose for the images, Arriba's use [was] transformative."[182]

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174. Williams v. Columbia Broad. Sys. Inc., 57 F. Supp. 2d 961, 968 (C.D. Cal. 1999). The court seems to use the term "parody" to describe both satire and parody. "A parody does not gain the protection of the Fair Use Doctrine if it merely uses the protected work as a means to ridicule another object." *Id.* Since parody, by its nature, does not ridicule "another object," but only the "protected work," the judge should have referred to the work in question as being satire, not parody.

175. Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997) (finding that making caricatures of O.J. Simpson look similar to *The Cat in the Hat* to be satire).

176. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (finding a book appropriating characters from *Gone with the Wind* to be parody).

177. Vogel, *supra* note 173, at 312.

178. GEORGE A. TEST, SATIRE: SPIRIT AND ART 160 (1991) ("The satirist uses the prior knowledge of the audience and the presumed ability of those in the audience to detect the incongruity, contraction, or incompatibility between what they know of the original style or form and what they perceive before them.").

179. *See* discussion *infra* Part III.B.5; *see also supra* Part II.B.

180. 336 F.3d 811, 818 (9th Cir. 2003).

181. *Id.* Specifically, the court found that Arriba's purpose in use of the images was to "improv[e] access to information on the internet" while Kelly's purpose was for "artistic expression." *Id.* at 819.

182. *Id.* at 819.

Dr. Seuss and *Kelly* dictate that a parodic work is *likely* transformative, and a work that is neither parody nor satire *can be* transformative, but a work that is satirical in nature is *presumptively* non-transformative. This incongruous result would prevent most mashups from being recognized as a transformative fair use.

5. Effects of the Parody-Satire Distinction on Mashups

Courts will likely classify mashups as satire because mashups often target their criticism at politics or society.[183] By aiming at these external elements and not at the works they are composed of, the "claim to fairness in borrowing from another's work"[184] needed to create mashups essentially vanishes, leaving mashups outside of the protection of fair use and as an infringement on the original author's derivative works right.

Arguably, the Court established a low standard for finding parody when it held that "[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived."[185] The "porous" nature of the distinction between parody and satire can potentially allow a mashup creator to assert that a mashup comprises fair use as a parody.[186] For example, one could argue the *Boulevard of Broken Songs* mashup is parody.[187] One could "reasonably" perceive the mashup as criticism of the music and videos in the source songs as generic and interchangeable with each other. This interchangeability explains why the songs mash together so well. The mashup of George Bush and Tony Blair singing *Endless Love* to each other could be seen as critiquing how "bland and banal"[188] the song is, as its lyrics can be used as easily to describe the feelings between political figures as between lovers. And one could argue *Mel Gibson's Signs of Anti-Semitism* critiques Gibson's role in *Signs* by exposing the flaws in casting him in the role of a hero and problem solver when he harbors feelings towards people of the Jewish faith that make him appear weak and illogical.

At the same time, the flexibility in the parody-satire distinction would also allow each of these mashups to be classified as satire. One could argue *Boulevard of Broken Songs* critiques the recording industry for signing bands

183. *See supra* Part II.B..

184. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

185. *Id.* at 582.

186. *See* Madison, *supra* note 170, at 1618 (noting in many instances, social criticism could be accepted as either parody or satire).

187. *See supra* Part II.A.4.

188. In *Campbell*, the Court believed 2 Live Crew's song was probably parody in part because 2 Live Crew's song made fun of how "bland and banal" Roy Orbison's *Oh, Pretty Woman* seemed to members of 2 Live Crew. *Campbell*, 510 U.S. at 582.

that sound too similar or lambastes the public for making the music popular. Similarly, one might see the Bush/Blair mashup as satirical commentary on foreign affairs rather than as criticism of the song itself. Finally, one could view the Gibson mashup as a satire about the events surrounding Gibson's arrest, rather than as commentary about his movies. Regardless of whether parody or satire is chosen, all of these mashups are transformative because they give the original works "new expression, meaning, or message."[189]

Under current copyright law, however, courts will only recognize this transformation in the case of parody. Nonetheless, this "recoding" of the meaning in the original materials has First Amendment value because it contributes to the marketplace of ideas.[190] Even so, fair use can only consistently protect that value if parody is found. Principally, the First Amendment values of this transformation have been rejected by the courts. These findings have occurred because courts hold copyright immune from a higher level of scrutiny when copyright conflicts with the First Amendment. Furthermore, in cases where the values underlying copyright and the First Amendment intersect, courts have held copyright need only have a rational basis for suppressing First Amendment values.[191]

IV. First Amendment and Copyright: A Constitutional Mashup

The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[192] Despite this command, several observers have noted that through copyright law, Congress and the courts have done exactly that.[193] One observer noted that "[c]opyright has always posed a potential conflict with the First Amendment: A successful copyright infringement action gives the plaintiff the right to stop the defendant from printing, performing, or otherwise disseminating certain works. Infringing works can be seized and destroyed — book burning mandated by law."[194] Although "arguably the country's most sweeping and important

189. *Id.* at 579.

190. Note, *supra* note 52, at 1497.

191. Eldred v. Ashcroft, 537 U.S. 186, 204 (2003) (examining the Copyright Term Extension Act to see if "it is a rational exercise of the legislative authority" of Congress).

192. U.S. CONST. amend. I.

193. *See generally* Netanel, *supra* note 142; Rubenfeld, *supra* note 99; Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319 (2003); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred*,* 44 Liquormart*, and* Bartnicki, 40 HOUS. L. REV. 697 (2003).

194. Tushnet, *supra* note 193, at 540.

regulation of speech,"[195] courts often explicitly decline to subject copyright to the First Amendment.[196] Indeed, one court went so far as to declare "copyrights are categorically immune from challenges under the First Amendment."[197] Under what one scholar has termed a "magic free speech immunity," most courts have rejected the existence of any conflict between copyright and the First Amendment.[198] This immunity stems from a duo of Supreme Court cases finding copyright to be largely free from First Amendment review.

A. Supreme Court Jurisprudence on Copyright and the First Amendment

1. Harper & Row, Publishers, Inc. v. Nation Enterprises

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the U.S. Supreme Court had the opportunity to widen the scope of fair use "when the information conveyed relates to matters of high public concern."[199] The defendants asserted that the Court needed to widen the scope of fair use in order to protect "First Amendment values."[200] The Court rejected this claim by holding that "copyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act."[201] The Court reasoned that copyright only protects the expression of ideas, rather than the facts or ideas themselves.[202] This leaves people free to communicate facts or ideas, just not in the manner that the original author expressed them.[203] The Court concluded that the defendant's proposed expansion of fair use would "effectively destroy any expectation of copyright protection" because an infringer could merely "dub[] the infringement a fair use."[204] Without such protections, the "economic incentive" of copyright would be destroyed,[205] leaving the public without access to the work to begin with.[206] Because of the idea/expression dichotomy, the Court found that "First Amendment protections [were] already

195. Rubenfeld, *supra* note 99, at 7 n.29.
196. *See* discussion *infra* Part III.A-B.
197. Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd sub nom.* Eldred v. Ashcroft, 537 U.S. 186 (2003).
198. Rubenfeld, *supra* note 99, at 7.
199. 471 U.S. 539, 555-56 (1985).
200. *Id.* at 555.
201. *Id.* at 556.
202. *Id.*
203. *Id.*
204. *Id.* at 557.
205. *Id.* at 558.
206. *Id.* at 557.

embodied in the Copyright [Act]" and thus refused to subject copyright to First Amendment scrutiny.[207]

2. Eldred v. Ashcroft

The U.S. Supreme Court again considered the possibility of conflict between copyright and the First Amendment in *Eldred v. Ashcroft*.[208] In *Eldred*, the petitioners challenged the retroactive application of the Copyright Term Extension Act to works that were about to enter the public domain.[209] The petitioner contended that this retroactive application affected his First Amendment rights and thereby warranted higher judicial scrutiny.[210] The Court squarely "reject[ed] petitioners' plea for imposition of uncommonly strict scrutiny" for copyright.[211] Citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court noted that "copyright law contains built-in First Amendment accommodations."[212] The Court then offered several reasons why copyright need not be subject to First Amendment scrutiny. First, as in *Harper & Row*, the Court again discussed the idea/expression dichotomy as a First Amendment safeguard.[213] Because copyright could only protect expression, not ideas, the Court reasoned that "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."[214]

Second, the Court examined fair use as a First Amendment safeguard. The Court explained that fair use insured an adequate balance between copyright and the First Amendment because fair use "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances."[215] Fair use, according to the Court, "affords considerable latitude for scholarship and comment, and even for parody."[216] Even with these two safeguards, the Court held that copyright does not possess categorical immunity from the First Amendment.[217] Nonetheless, the Court

207. *Id.* at 560.
208. 537 U.S. 186 (2003).
209. *Id.* at 218 n.23.
210. *Id.* at 218.
211. *Id.* at 218-19.
212. *Id.* at 219.
213. *Id.*; *see also supra* Part IV.A.
214. *Eldred*, 537 U.S. at 219 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349-50 (1991)).
215. *Id.* at 219.
216. *Id.* (citations omitted).
217. *Id.* at 221.

held that it would not apply a strict First Amendment scrutiny unless Congress drastically alters the contours of copyright.[218]

Finally, the Court explained that copyright was added to the Constitution "close in time" to the First Amendment.[219] The Court reasoned that the temporal proximity of the two clauses "indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."[220] According to the Court, this compatibility is evident because guaranteeing a "marketable right to the use of one's expression" creates the "economic incentive to create and disseminate ideas."[221] Despite this attempt to reconcile copyright and the First Amendment, *Eldred* and *Harper & Row* do not adequately address First Amendment concerns.

3. Problems with the Harper & Row *and* Eldred *Decisions*

The Court's analysis in *Harper & Row* and *Eldred* failed to adequately explain copyright's immunity from a more rigorous examination under the First Amendment. First, the Court misplaced its reliance on the idea/expression dichotomy as an adequate safeguard of the First Amendment. Indeed, the Court has previously ruled that, in the free speech context, the government may not censor expression while claiming it still allows expression of the idea in alternate forms.[222] The Court has held that speakers often find a particular method of expression necessary to communicate a particular idea.[223] The idea/expression dichotomy, however, fundamentally conflicts with this principle.[224] The Court cannot logically conclude that the marriage of idea and expression are necessary to promote free speech, while at the same time concluding their separation somehow promotes the First Amendment in the context of copyright.

Second, current fair use standards serve to harm the expressive interests embodied by the First Amendment rather than advance them.[225] This occurs because fair use represents an inherently "nebulous" concept.[226] Additionally,

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218. *Id.*

219. *Id.* at 219.

220. *Id.*

221. *Id.* (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).

222. Cohen v. California, 403 U.S. 15, 25-26 (1971).

223. *Id.*

224. *See* Rubenfeld, *supra* note 99, at 14-15 (noting outside of copyright law, the First Amendment prohibits regulations that proscribe "particular forms of expressing ideas, rather than the ideas themselves").

225. *See, e.g.*, Tushnet, *supra* note 193, at 545 (explaining how fair use causes self-censorship).

226. John Tehranian, *Whither Copyright?: Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1216.

courts have balanced the factors used to determine fair use in ways that appear inconsistent.[227] Further, the statutory factors used to determine fair use are not exclusive, and courts can consider any other issue deemed relevant.[228] The flexibility of fair use, which the *Eldred* Court said provided "considerable latitude" for speech activities,[229] creates doctrinal uncertainty.[230] Given the tremendous liability one faces for violating copyright,[231] any uncertainty infuses large risks into acts of creation where the creator hopes fair use will protect the transformation of another's work.[232] This risk prompts the "kind of self-censorship [that] is traditionally a matter of concern to the First Amendment."[233]

Third, the *Eldred* Court's assertions of compatibility between copyright and the First Amendment are conclusory and ignore the advances made in both copyright law and First Amendment jurisprudence since the adoption of the Constitution. The Court noted that because the Copyright Clause and the First Amendment "were adopted close in time," copyright is compatible with the First Amendment.[234] The Court also noted "copyright's purpose is to *promote* the creation and publication of free expression."[235] These statements offer little insight into why courts have heretofore thought copyright and the First Amendment compatible. The fact that both copyright and the First Amendment were contemporaneously incorporated into the Constitution does little to explain their relation to each other.[236] Just because copyright appears in the Constitution does not mean it is exempt from the First Amendment.[237] The Interstate Commerce Clause was also adopted "close in time" to the First Amendment, but a federal law prohibiting transportation of political literature across state lines would not likely survive First Amendment scrutiny.[238]

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227. *Id.* at 1215-16.

228. Netanel, *supra* note 142, at 20-21.

229. Eldred v. Ashcroft, 537 U.S. 186, 220 (2003) (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985)).

230. Tushnet, *supra* note 193, at 544.

231. Individuals face $150,000 in statutory damages per instance of copyright violation. 17 U.S.C. § 504(c)(2) (2000).

232. *See* Tehranian, *supra* note 226, at 1216 (stating that the substantial liability copyright imposes on infringers makes most people unwilling to bear the potential risk of infringement).

233. Tushnet, *supra* note 193, at 545.

234. *Eldred*, 537 U.S. at 219.

235. *Id.*

236. *See* Rubenfeld, *supra* note 99, at 13 (noting the existence of the Copyright Clause in the Constitution only shows that some copyright is constitutional, not that all copyright is constitutional).

237. *Id.*

238. *Id.* at 12. Rubenfeld provides the example of a law prohibiting the sale of the Bible across state lines. *Id.*

Finally, copyright has dramatically changed both in terms of scope and duration since the adoption of the Constitution.[239] One scholar has posited that the Founders might no longer find copyright and the First Amendment compatible given these changes.[240] Even the *Eldred* Court held that copyright might be subject to First Amendment scrutiny if Congress altered the "traditional contours" of copyright.[241] The *Eldred* Court, however, simply reaffirmed *Harper & Row*'s holding that "copyright supplies the economic incentive to create and disseminate ideas" without giving due consideration to the substantial enlargement both the scope and duration of copyright have undergone.[242]

The Court's refusal to acknowledge the First Amendment conflict in *Harper & Row* and *Eldred* has prevented other courts from taking a meaningful look at the intersection between copyright and the First Amendment.[243] Consequently, courts have not examined copyright's implications on expressive transformative works, such as mashups, through the lens of the First Amendment. Conducting such an examination, however, reveals that copyright does indeed pose serious First Amendment conflicts.

B. Reasons Copyright Conflicts with the First Amendment

Scholars have suggested varying reasons for why courts should subject copyright to heightened judicial scrutiny when resolving First Amendment conflicts. These scholars believe copyright is viewpoint discriminatory, a content-based speech regulation, a content-neutral speech regulation, and an unlawful prior restraint. In the context of mashups and other transformative works, however, uncertainty exists concerning whether these traditional First Amendment doctrines, if applied to copyright, would provide mashups with any meaningful protection.

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239. Tushnet, *supra* note 193, at 541-43 (describing how copyright's scope has expanded beyond just printed works and how copyright's duration has ballooned from a *maximum* of twenty-eight years to a *minimum* of seventy years).

240. *See generally* Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium"*, 89 MINN. L. REV. 1318 (2005).

241. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

242. *Id.* at 219 (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).

243. Rubenfeld, *supra* note 99, at 7.

1. Copyright Is a Viewpoint Discriminatory Speech Regulation

Copyright law favors works that are "critical" of previously copyrighted works when determining if an infringing work constitutes a fair use.[244] Generally, courts look to see if the alleged infringing activity has "critical bearing" on the original work.[245] Absent a finding of this element, a court will likely determine that no fair use exists.[246] As one scholar has observed, "if you and I borrow exactly the same amount of material from a copyrighted work, I may escape liability because my speech criticized the copyrighted work, while you may be forced to pay damages because yours did not."[247]

In traditional free speech law, a speech restriction based on viewpoint "is considered virtually unconstitutional per se."[248] If Congress passed a law making speeches about the president illegal unless the speeches criticized the president, a court would almost certainly strike the law down as viewpoint discriminatory.[249] Nevertheless, in copyright cases, courts not only examine the critical nature of potentially infringing speech, but also regularly enjoin non-critical speech.[250] As a result of this focus, judicial decisions seem "to serve a single overriding value of protecting criticism rather than . . . different kinds of speech."[251] Favoring criticism over other viewpoints, such as praise or emulation, renders copyright a viewpoint discriminatory speech regulation.[252]

2. Copyright Is a Content-Based Speech Regulation

Copyright defines prohibited expression based on the expression's content. Therefore, courts should consider copyright a content-based regulation for two reasons. First, copyright aims to curb speech based on the subject matter of the expression.[253] Unlike content-neutral regulations that regulate speech for reasons unrelated to content, such as time, place, and manner restrictions,[254]

244. *See* 17 U.S.C. § 107 (2001) (stating criticism is a fair use).
245. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).
246. *Id.*
247. Rubenfeld, *supra* note 99, at 17.
248. *Id.* at 6; *see also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").
249. Rubenfeld, *supra* note 99, at 6-7.
250. *Id.* at 7.
251. Tushnet, *supra* note 193, at 548.
252. *See, e.g.*, Rubenfeld, *supra* note 99, at 7.
253. Volokh, *supra* note 193, at 703-06.
254. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

content-based regulations target speech for the sake of the speech's content.[255] While copyright law allows a creator broad freedom to create almost anything, that freedom ends where the content of the creation resembles pre-existing content.[256]

Second, the fair use exception to copyright law makes copyright a content-based regulation. Even when a law does not seek to control content, "[t]he Court has repeatedly held that a law's content-based exceptions make the law itself content-based."[257] Thus, in *Regan v. Time, Inc.*, the Court found a restriction on photographic currency reproduction content-based because the restriction contained several exceptions to the ban, such as allowing reproductions for newsworthy purposes.[258] Copyright law contains a similar exception in the statutory factor of fair use that examines the use's "purpose and character."[259] Applying the holding of *Regan* to copyright's "different treatment for news, parody, and commentary . . . likewise makes copyright law content-based."[260]

3. Copyright Is a Content-Neutral Speech Regulation

Other observers have argued that courts should not consider copyright a content-based regulation, but instead should treat copyright as a content-neutral speech regulation.[261] One scholar asserted that copyright does not fit well within the rubric of content-based regulations because the government does not take a position on the subject matter or message conveyed in instances of copyright infringement.[262] Rather, copyright examines the similarities between the alleged infringing content and the content of a copyrighted work.[263] Copyright's "content-sensitiv[ity]" does not "mean that it is 'content-based' within the meaning of the First Amendment."[264] Accordingly, courts should view copyright as falling in a subcategory of content-neutral regulations dealing with speech entitlements.[265] Under such entitlements, the government controls "what is expressed via a given channel

255. Volokh, *supra* note 193, at 705.
256. *Id.* at 703; Rubenfeld, *supra* note 99, at 5-6.
257. Volokh, *supra* note 193, at 706; *see also* Police Dep't of City of Chi. v. Mosley, 408 U.S. 92, 99 (1972) (noting that Chicago's ban on all picketing except labor-related picketing was impermissible because the exception was related to the subject matter of the expression).
258. 468 U.S. 641, 648 (1984).
259. 17 U.S.C. § 107(1) (2000).
260. Volokh, *supra* note 193, at 708.
261. *See, e.g.*, Netanel, *supra* note 142, at 48.
262. *Id.* at 49.
263. *Id.*
264. *Id.* at 48.
265. *Id.* at 55.

of communication, . . . and rights to control uses of particular expressive content."[266]

In *Turner Broadcasting System, Inc. v. FCC*, the Court considered the legality of this subcategory of speech entitlements.[267] At issue was a television broadcast "must-carry" requirement that mandated cable operators carry local broadcasts.[268] Although the Court purported to use an intermediate scrutiny test for content-neutral regulations like the test used in *Ward v. Rock Against Racism*,[269] the Court applied the test with "unaccustomed vigor."[270] It required the government to bear the burden "of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[271] It also determined that when a regulation implicated the First Amendment, the Court's traditional deference to legislative findings would not prevent the Court from exercising its own "independent judgment of the facts."[272] On remand, the Court held that the government had to demonstrate that Congress acted on "reasonable inferences based on substantial evidence" when enacting the must-carry provisions.[273]

Like the must-carry provisions, copyright also constitutes a speech entitlement.[274] As with other speech entitlements, copyright involves control over "what is expressed via a given channel of communication" and "rights to control uses of particular expressive content."[275] As a speech entitlement, copyright represents a content-neutral regulation that courts should subject to the same intermediate scrutiny with "vigor"[276] test that the Court used in *Turner*.[277]

4. Copyright Is a Prior Restraint on Publication

One of the core principles of the First Amendment holds that the government may not prohibit the publication of materials, even if it may

266. *Id.*
267. 512 U.S. 622 (1994).
268. *Id.* at 622.
269. *Id.* at 661-62 (citing Ward v. Rock Against Racism 491 U.S. 781 (1989)).
270. Netanel, *supra* note 142, at 56.
271. *Turner*, 512 U.S. at 665 (quoting *Ward*, 491 U.S. at 799).
272. *Id.* at 666.
273. *Id.*
274. *See* Netanel, *supra* note 142, at 55.
275. *Id.*
276. *Id.* at 56.
277. 512 U.S. 622. The Court rejected application of *Turner* to copyright in *Eldred v. Ashcroft*, 537 U.S. 186, 220-21 (2003). The *Eldred* Court, however, only considered the Copyright Term Extension Act, and not copyright in general, under *Turner*'s analysis. *Id.*

subsequently punish for that publication.[278] Indeed, the Court has held that "it has been generally, if not universally, considered that it is the chief purpose of the guaranty [of freedom of the press] to prevent previous restraints upon publication."[279] This prohibition exists so that "the press would remain forever free to censure the Government."[280] Even in instances where the potential consequences of such publication are grave, such as possibly threatening national security, the government may not restrain publication of the material except in very limited circumstances.[281] Copyright, however, often directly contradicts this core First Amendment principle. A suit for copyright infringement empowers a court to enjoin publication and dissemination of the infringing works.[282] Commentators have argued that copyright actually favors prior restraints because courts often presume a plaintiff will suffer irreparable injury should the infringement occur.[283]

Not all courts, however, have followed this presumption. The Eleventh Circuit recognized copyright's effect as a prior restraint, and briefly reversed a lower court action on the grounds that an injunction prohibiting publication of an allegedly infringing book "amount[ed] to an unlawful prior restraint in violation of the First Amendment."[284] Despite this temporary recognition of copyright as a prior restraint, no other court appears to have addressed this argument.[285]

C. Mashups and the Failure of Traditional Forms of Scrutiny

If courts adopted one of the above forms of scrutiny, such scrutiny would probably not provide mashups with any meaningful protection. Even under a level of heightened scrutiny, courts would likely still find copyright to comprise the type of narrowly tailored, substantial government interest needed to overcome heightened scrutiny.[286] Indeed, the Court has already ruled on the

278. *See* Rubenfeld, *supra* note 99, at 6.

279. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

280. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

281. *Id.* at 714 (per curiam); *see also Near*, 283 U.S. at 716 (noting prior restraint will only be allowed in "exceptional cases").

282. Tushnet, *supra* note 193, at 540.

283. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 158-59 (1998).

284. Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 (11th Cir. 2001). The Eleventh Circuit later vacated this opinion and reversed the lower court's injunction on other grounds. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

285. Rubenfeld, *supra* note 99, at 9.

286. Given the abundance of industry-generated materials concerning the need for expanded copyright, making the necessary legislative findings would not be difficult for Congress. *See* Voegtli, *supra* note 82, at 1237-38 n.139.

importance of this interest and determined that derivative works rights create incentives for authors to produce.[287] Additionally, the Court continues to assume that current copyright law still follows the "traditional contours" of copyright, despite copyright's dramatic expansion in scope and duration. Given copyright's constitutional mandate, and the continued reluctance by the Court to recognize the changes copyright has undergone, the government would likely still meet its burden even under a more rigorous First Amendment scrutiny.

Eldred v. Ashcroft provides further evidence of the failure of traditional heightened scrutiny to provide First Amendment protections to copyright.[288] In *Eldred*, the Court specifically rejected applying the heightened scrutiny of *Turner Broadcasting System, Inc. v. FCC* to the Copyright Term Extension Act (CTEA).[289] In so doing, the Court determined that copyright merely "protects authors' original expression from unrestricted exploitation."[290] As such, laws like the CTEA do "not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas."[291] The Court's continued reliance on the assumed "built-in free speech safeguards,"[292] including the idea/expression dichotomy and fair use, demonstrate the Court is unlikely to ever subject copyright to higher scrutiny in favor of the First Amendment.

Although current First Amendment jurisprudence does not provide a mechanism to give mashups meaningful protection from copyright, such a mechanism would be desirable to promote First Amendment values. Fundamentally, denying mashups the protection of the First Amendment undercuts both the expressive goals of the First Amendment and copyright's promised expansive marketplace of ideas.

V. Expression Denied: How Mashups Could Serve First Amendment Goals

As explained in Part II.B, mashups enable people to engage in commentary regarding a variety of current affairs. This Part will examine how the failure of copyright law to promote, or even allow, such creations serves to inhibit First Amendment interests. Specifically, current copyright law stifles both political dissent and the marketplace of ideas by making mashups

287. *See generally* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (discussing the financial incentives created by copyright and derivative works rights).

288. 537 U.S. 186 (2002).

289. *Id.* at 220-21.

290. *Id.* at 221.

291. *Id.*

292. *Id.*

"presumptively illegal."[293] Further, the current trend towards strong copyright regulations serves to perpetuate itself, thereby making a balanced copyright system that promotes creativity and expression increasingly difficult to achieve.

A. Suppression of Political Discussion

The Internet gives people the opportunity to communicate in ways never before enjoyed by large portions of society, both in terms of content creation and potential audience size.[294] Web logs, otherwise known as "blogs," exemplify this phenomenon. Rather than creating blogs for profit motives, most individuals create them as amateur endeavors in order to engage in discourse about current events.[295] The low cost and wide availability of blogging technology make it possible for anyone to publish his or her own ideas, rendering blogging markedly different from traditional print media.[296] As one scholar observed about blogs, "[t]his speech affects democracy. . . . As more and more citizens express what they think, and defend it in writing, that will change the way people understand public issues."[297] Additionally, blogging carries greater communicative potential than making a speech in the town square. Unlike the town square, blogging allows asynchronous expression of beliefs and gives multiple people the opportunity to engage in discourse without having to gather in a particular place at a particular time.[298]

Video mashups present an even more exciting opportunity for creative political discourse than blogging. Via the Internet, not only do mashups allow for the same audience reach as blogs, but mashups facilitate expression in an entirely new manner. Not limited to text, a mashup creator can express a message by combining text, audio, images, and video together within a single mashup. Further, mashups allow creators to take familiar cultural symbols and re-appropriate them to give these symbols new meaning. As a result, mashups can form expression more powerful than expression created using words alone.

For example, consider the mashup video *Loose Change*. *Loose Change* involves the events surrounding the September 11th attacks on the World

293. Lessig, *supra* note 16, at 965; *see also supra* Part II.B.

294. *See* Hunter & Lastowka, *supra* note 26, at 979-84 (discussing the evolution of information from being primarily text-based to the digital manipulation available via the Internet).

295. LESSIG, *supra* note 11, at 44.

296. *See* Hunter & Lastowka, *supra* note 26, at 984 (discussing both the implications and amateur use of blogs).

297. LESSIG, *supra* note 11, at 45.

298. *Id.* at 42-43.

Trade Center and the Pentagon.[299] The creators of the mashup made it with the purpose of showing "that the United States Government was, at the very least, criminally negligent in allowing the attacks of September 11th, 2001 to occur."[300] The mashup combines video, audio, text, and images from numerous sources to present a story that disputes the official explanations of the September 11th attack. Although *Loose Change* presents a controversial message, the audio-visual elements combined in the mashup likely enhance *Loose Change*'s impact on viewers.[301] Seeing the videos that the creators use as evidence in their attempt to persuade audience members gives their message greater impact than words alone could. This enhanced impact occurs because one can more easily judge for himself or herself whether the phenomena the creators describe actually occurred.[302] As text alone, the message would likely lose much of its meaning. At a minimum, if *Loose Change*'s creators were relegated to explaining in text what they attempt to demonstrate through the mashup, they would face substantial difficulties explaining their theory of a conspiracy. Regardless of one's personal beliefs about the creators or their message, mashups like *Loose Change* fall squarely in line with the major First Amendment purpose of citizens criticizing the government.[303]

The restrictive copyright regulations currently in place, however, make it unlikely that creators will realize the full potential of mashups in affecting political discourse. Although mashups such as *Loose Change* contain an extensive disclaimer explaining that all the footage used is unlicensed,[304] such a disclaimer offers no protection against copyright liability.[305] While limited instances of mashup creativity like *Loose Change* might always exist, copyright restrictions will continue to chill mashups that use audio-visual elements. This chilling effect results from the fact that copyright holders use

299. Loose Change 2nd Edition Recut, http://video.google.com/videoplay?docid=7866929448192753501 (last visited Oct. 3, 2007).

300. Loose Change Website, http://www.loosechange911.com/index_main.html (last visited Oct. 3, 2007).

301. Nancy Jo Sales, *Click Here for Conspiracy*, VANITY FAIR, Aug. 2006, at 112, *available at* http://www.vanityfair.com/ontheweb/features/2006/08/loosechange200608.

302. Mark Morford, *Sept. 11 Left Us with a Host of Questions*, S.F. CHRON., Mar. 29, 2006, at E1 (describing how videos such as *Loose Change* will be more persuasive to those who need more than textual explanations).

303. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people.").

304. Loose Change 2nd Edition Recut, *supra* note 299.

305. 17 U.S.C. § 106 (2000). Among other things, the section grants copyright holders exclusive rights to their works, exempting from these rights certain statutory provisions. None of these provisions provide disclaimer or attribution sufficient to alleviate copyright liability. *See also id.* §§ 107-122.

copyright to punish those who mash and remix copyrighted materials.[306] Ultimately, this means that the creativity used to create these messages "will either never be exercised, or never be exercised in the open."[307]

B. A Less Vibrant Marketplace

Copyright restrictions impose consequences not only on political discourse, but on the marketplace of ideas as well. As the current generation matures, they will find themselves in a media landscape substantially different from the one of earlier generations.[308] What was once a passive, "read only" culture that largely consumed media has transformed into a culture of participation that both consumes and creates information.[309] Participation in this culture will increasingly require knowledge of activities like creating mashups. Under existing copyright regulations, however, the law works to stifle this creative activity and thereby restrict this type of expression.

1. Education and Media (Il)Literacy

One must have a grasp of traditional literacy skills in order to communicate textually. Arguably, a person can better express ideas in textual form as that person gains more practice in reading and writing.[310] This argument also applies to media literacy, or the way "media works [and] the way it's constructed."[311] In fact, a growing field of academics posits that this form of literacy bears "crucial [importance] to the next generation of our culture."[312] Fundamentally, the changing media landscape will increasingly render the written word less important in understanding and constructing meaning.[313] As a result, text will prove insufficient for either properly expressing ideas or having those ideas understood by others.[314] Thus, training children in media literacy skills and the audio-visual expression of the twenty-first century will help insure that large numbers of people have the ability to express their ideas in an effective manner.[315]

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306. LESSIG, *supra* note 11, at 185.
307. *Id.*
308. *See id.* at 37 (describing the changing media of the twenty-first century).
309. *Id.*
310. *See id.* at 36 (discussing how proficiency in writing is gained through practice).
311. *Id.*
312. *Id.*
313. *See id.* at 39 (explaining how giving children the ability to take visual elements that they understand and create a video from them better allows the children to express themselves than using text does).
314. *Id.* at 38-39.
315. *Id.* at 37-38.

Copyright law, however, poses problems for this form of education. The illegality of activities like creating mashups means that "schools are not likely to teach [such activities]."[316] Further, businesses will not develop the tools to help facilitate education in media literacy so long as these activities remain illegal under copyright law.[317] The lack of ability to obtain such an education, either in or out of school, results in a large degree of media illiteracy.[318] Consequently, people will lack the empowerment necessary to use "the language of the twenty-first century" to express their ideas and beliefs.[319]

2. The Marketplace in General

Copyright's constraint on mashups has implications not only for the marketplace of ideas of the coming generation, but also for the current marketplace. Copyright chills mashup creativity. Due to the illegality of remixing copyrighted materials, people who would have remixed copyrighted materials in a mashup do not do so.[320] The costs, either in terms of financial penalties for breaking the law[321] or in terms of effort needed to secure the necessary permissions to avoid infringing anyone's copyright, present such substantial deterrents that many people simply forgo engaging in this form of expression.[322] Accordingly, creators who would use mashups "to express themselves differently, or criticize culture differently" will not do so if copyright forbids them to remix and transform information into mashups.[323] Until copyright changes to allow people to create mashups without having to fear breaking the law, copyright will continue to thwart a more vibrant marketplace of ideas.[324]

C. Entrenched Copyright Regulation

Copyright regulations also damage the marketplace of ideas because these regulations tend to perpetuate themselves. Over the past two hundred years,

316. Lessig, *supra* note 16, at 969.
317. *Id.*
318. LESSIG, *supra* note 11, at 37.
319. *Id.* at 38.
320. *Id.* at 185.
321. Each willful violation of a person's copyright can result in statutory damages of up to $150,000 per incident. As a result, a single mashup creator could potentially face millions of dollars in liability for a mashup containing content from several copyrighted works. *See* 17 U.S.C. § 504(c)(2) (2000).
322. LESSIG, *supra* note 11, at 106 (discussing how the "costs" of complying with copyright dissuade people from remixing content).
323. Lessig, *supra* note 16, at 971.
324. LESSIG, *supra* note 11, at 187.

rights granted under copyright have gained strength.[325] As copyright's scope has expanded, society has come to see the intellectual property that copyright governs as more of a traditional property right, rather than as a limited monopoly granted by the government.[326] This shift in perception has manifested itself as a perceived need for copyright holders to have greater control over their intellectual property.[327] Consequently, as more control passed to copyright holders, intellectual property began to more closely resemble the "bundle" of rights associated with traditional property.[328] Further, the reasons for having copyright law treat intellectual property differently than traditional property blurred, and as they blurred, lawmakers had difficulty justifying the different set of rules that governed intellectual property.[329] As lawmakers now work to eliminate some of the distinctions, justifying the remaining distinctions between intellectual property and traditional property presents even more difficulty.[330] One scholar has described this perceived need to eliminate the differences between intellectual property and traditional property as an "inertia" towards making copyright a system of "perfect control."[331] Such inertia results in increased limitations on both fair use and the public domain.[332] While this inertia towards perfect copyright control gives some people incentive to create, it ultimately denies to many others the opportunity to engage in expression.[333]

Without action to limit some of these regulations, copyright law will likely continue to transform into more of a traditional property right.[334] Indeed, members of Congress have already discussed proposals to change the duration of copyright to "forever less one day"[335] in order to comply with the

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325. *See* Eldred v. Ashcroft, 537 U.S. 186, 200-02 (2003) (listing some of the previous extensions to copyright's term); Voegtli, *supra* note 82, at 1233-39 (describing the expansion of derivative rights).

326. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1068 (2001).

327. *Id.* at 1069.

328. Lawrence Lessig, *Dunwody Distinguished Lecture in Law: The Creative Commons*, 55 FLA. L. REV. 763, 775 (2003).

329. *See* Lessig, *supra* note 326, at 1068-69 (describing the transformation of how society came to view intellectual property as a traditional property right).

330. *See* Lessig, *supra* note 328, at 775-76 (explaining how property rhetoric has made it increasingly hard for society to understand why intellectual property is treated differently than traditional property).

331. Lawrence Lessig, *Lecture: The Architecture of Innovation*, 51 DUKE L.J. 1784, 1795 (2002).

332. *See id.* at 1798-99 (describing how the move to perfect copyright control and its effect on the public domain goes largely unnoticed).

333. *Id.* at 1799.

334. *Id.* at 1795.

335. Lessig, *supra* note 326, at 1065 (quoting 144 CONG. REC. H9952 (1998) (statement of

Constitutional mandate that copyright be granted for only "limited [t]imes."[336] Expanded copyright control will leave expression like mashups increasingly unproduced and unprotected because of the difficulties in obtaining the content needed to create the mashups.[337] Although scholars have proposed various solutions to re-establish a balance between copyright and expressive interests, these solutions seem unlikely to resolve the problems copyright poses for mashups.

VI. Proposed Solutions Fall Short of Promoting Expression Through Mashups

Video mashups pose unique considerations compared to other copyright problems. Mashups generally comprise a form of amateur creation done for purposes of expression rather than for profit.[338] Also, many mashup artists rely on recently created content to form the materials used within the mashups.[339] Furthermore, unlike cases of pure digital piracy, mashup creators transform the materials they appropriate into a new form of expression.[340] Because of these attributes, two solutions commonly proposed by scholars will likely have little effect in promoting and protecting mashups as a form of expression. These two proposals suggest either making copyright a function of time, or creating a system of compulsory licensing that would give authors a statutory right to use already existing copyrighted works.

A. Ticking Away the Copyright Seconds

Several proposals to reduce the control of copyright over expression suggest altering copyright's term by correlating a creator's rights under copyright with the passage of time. These proposals have recommended reducing copyright's term,[341] shortening the length of time for the derivative works right,[342] only

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Rep. Mary Bono)).

336. U.S. CONST. art. I, § 8, cl. 8.

337. *See* Lessig, *supra* note 331, at 1798-99 (describing how expanded copyright will kill expressive creativity); *see also* Neil Weinstock Netanel, *Copyright and Democracy*, 106 YALE L.J. 283, 381 (1996) (describing how uncertainties in copyright law often make digital sampling a prohibitively uncertain and expensive activity).

338. *See, e.g.*, Oser, *supra* note 19, at 58 (describing how mashup creators infiltrated a video mashup creation contest sponsored by General Motors Corp. to criticize the policies of the corporation); Steve Smith, *And a Farting Preacher Shall Lead Us*, ECONTENT, May 2006, at 22 (describing how the coming generation of mashup creators is "primed for self-expression").

339. *See supra* Part II.B.2.

340. *See supra* Part II.

341. *A Radical Rethink: Copyrights*, ECONOMIST, Jan. 25, 2003, at 13.

342. LESSIG, *supra* note 11, at 294-95.

granting copyright for as long as creators formally renew their copyright,[343] and making the passage of time a factor in fair use analysis.[344] Although such proposals vary in their specifics, they all attempt to reduce a copyright holder's rights as time passes. While these proposals would broaden the public domain,[345] two problems will prevent time-based solutions from affording appropriate protections to mashup creators.

First, these proposals present a problem because video mashups, especially mashups containing social commentary or political messages, often relate to current events.[346] Because of this, mashup creators frequently rely on recently created content in order to produce their mashups. For example, the mashup *George Bush Doesn't Care About Black People* that used Kanye West's comments about how the government responded to Hurricane Katrina[347] would not benefit from making copyright a function of time. All such time-based proposals contemplate a period of many years of full copyright protection for copyright holders. This leaves creators of mashups like *George Bush Doesn't Care About Black People* with two dissatisfactory choices. On the one hand, if the mashup creator waits until time allows for the lawful use of the source materials, the expression the mashup creator hopes to convey will have greatly diminished. Even assuming a period of protection as short as ten years, the relevance of Hurricane Katrina will have faded, and most members of the federal administration will no longer hold office.[348]

On the other hand, if the mashup creator chooses to make the mashup within a short time of the event, then the creator will violate the shortened copyright term. In the case of *George Bush Doesn't Care About Black People*, the creation of all the relevant source materials in the mashup occurred only a short time before the creation of the mashup itself. In order for mashup artists to express their beliefs about current events, they will often have to use materials produced contemporaneously with those events. Even with a shortened term for copyright protection, however, use of these materials by mashup creators will still violate copyright.

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343. Sprigman, *supra* note 93, at 521-22, 553.

344. Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 461 (2002).

345. LESSIG, *supra* note 11, at 293.

346. *See supra* Part II.B.2.

347. *See supra* Part II.B.2.

348. In the example of *George Bush Doesn't Care About Black People*, a ten year copyright protection would mean that by the time the mashup was created, much of New Orleans would be rebuilt, George Bush's term in office would be over, and most of Bush's appointees would no longer be part of the federal government. This would make the criticism of George Bush in the mashup largely irrelevant.

Second, these proposals present a problem because creators have no way to tell when the term of copyright protection begins.[349] Previous versions of the Copyright Act required certain registration formalities in order for copyright to protect a work.[350] The current Act, however, requires no such formalities.[351] Instead, a work receives protection the moment the author has "fixed" the expression to some type of medium.[352] This means that if a mashup creator wants to include a portion of a video in a mashup, the creator might not have an easy way to tell when copyright protection on the video began. Accordingly, if the creator does not know when protection began, the creator also cannot determine when it ends. Even if a mashup creator wanted to follow copyright's strictures and respect a shortened copyright term, the absence of registration formalities makes it difficult for the creator to do so.

B. License to Mash

Another proposal to limit the power of copyright holders over transformative works involves creating a system of compulsory licensing.[353] Under such a system, those who wanted to use copyrighted materials in making their own creation would pay either a fee or a portion of revenues to the copyright holders, depending on if the creation was commercial or non-commercial.[354] Further, some proposals suggest allowing copyright holders to "opt out" of the compulsory licensing system, thereby preventing their works from being compulsorily licensed.[355] Unlike current copyright law, a compulsory licensing system contemplates the elimination of the copyright holder's ability to refuse consent for the new creation.[356] Creators of new

349. *Cf.* LESSIG, *supra* note 11, at 220-25 (discussing how tracking owners of copyright under the current system is difficult in the case of books and films).

350. *See* Sprigman, *supra* note 93, at 491-94 (discussing the various formalities present in older versions of the Copyright Act).

351. *Id.* at 494.

352. 17 U.S.C. § 102(a) (2000).

353. *See, e.g.*, Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 212 (2004) (suggesting compulsory licensing would be beneficial for mashup albums like *The Grey Album*); Randy S. Kravis, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 273 (1993) (recommending adoption of compulsory licensing to promote digital sampling); Note, *supra* note 52, at 1504 (noting how recoding activities could be benefited by compulsory licensing).

354. *See* Lessig, *supra* note 16, at 973 (describing the different fees licensing could charge for commercial and non-commercial use of copyrighted materials).

355. *Id.*

356. *See* Voegtli, *supra* note 82, at 1264 (noting compulsory licensing eliminates the "permission problem" for those who want to use copyrighted works).

materials "will be entitled to create their works [using the copyrighted materials], but will risk being held liable to the original creator."[357] Indeed, the Copyright Act already embraces a similar compulsory license for musicians who record covers of copyrighted songs.[358] Compulsory licensing would allow mashup creators potentially greater access to materials by removing the copyright holder's ability to refuse consent. For three reasons, however, this proposal still does not provide mashup creators the optimum ability to engage in expression.

First, a compulsory licensing system increases the costs of producing a mashup. Certainly, a compulsory licensing system could decrease the transactional costs of negotiating with individual copyright holders for the rights to transform their works.[359] This advantage, however, would only provide nominal benefits. Because most mashup creators do not seek authorization to produce their mashups, these creators already suffer no transaction costs.[360] Notwithstanding any minimal savings that might result from lowered transaction costs, compulsory licensing would nevertheless increase the production costs of a mashup.[361] Especially in cases where a mashup creator assembles a mashup from many copyrighted materials, the creator would face licensing costs so significant that the costs could deter the creator from making the mashup.[362]

Second, a system of compulsory licensing might deter creators from making mashups by denying them the ability to engage in anonymous speech. The Court has repeatedly recognized the importance that anonymous speech serves in the achievement of First Amendment goals.[363] In fact, the Court has even explained that, at least in terms of literary works, "having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[364] A compulsory licensing

357. Note, *supra* note 52, at 1504.

358. 17 U.S.C. § 115 (2000).

359. Voegtli, *supra* note 82, at 1264 (discussing how compulsory licensing would eliminate transactional costs for appropriators of copyrighted materials).

360. *See* Croal, *supra* note 98, at 61 (mentioning how video mashups tend to be unauthorized).

361. Voegtli, *supra* note 82, at 1264.

362. *Id.*

363. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) ("Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."); Talley v. California, 362 U.S. 60, 64 (1960) ("There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.").

364. *McIntyre*, 514 U.S. at 342.

system, however, would circumvent this principle by requiring mashup artists to disclose their identity in order to comply with the law. Indeed, a corollary of licensing copyrighted materials requires a person to receive a license. This license can only have effect if issued to the person or entity who will use the licensed work.[365] Moreover, the Copyright Office will have to keep records of which people have a proper license to use copyrighted materials.[366] As a result, based on the materials in a mashup, someone could easily determine who made the mashup.

For example, viewers of the mashup *George Bush Doesn't Care About Black People* know the creators only by their Internet monikers of The Black Lantern and The Legendary KO.[367] If the creators complied with a compulsory licensing system, however, someone could determine the creators' identities with relative ease by searching the licensing database for people who had licensed all the various video and audio clips used in the mashup. Consequently, mashup creators would encounter difficulties if they tried to engage in anonymous expression. In fairness, a determined investigator might still discover the identities of mashup creators even without the aid of compulsory licensing records.[368] Nonetheless, increased ability to determine a mashup creator's identity in a relatively quick and easy manner using such records would serve to discourage mashup creators from engaging in expression within the confines of the compulsory licensing system.

Finally, a compulsory licensing system that allowed copyright holders to "opt out," would make the system highly ineffective. Several companies control a large percentage of media in the United States.[369] This control would enable these companies to exclude a large portion of available content from the licensing system. Indeed, given that many of these companies have previously pushed for greater control over their copyrighted materials,[370] mass opting-out

365. *Cf.* 37 C.F.R. § 201.18(d)(1) (2007). This section details how under the current compulsory license system for musical covers, a person must provide detailed identification information. This includes "[t]he full legal name of the person or entity intending to obtain the compulsory license, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords," as well as addresses and telephone numbers. *Id.* A signature of the intended licensee is also required. *Id.* § 201.18(e).

366. *Cf. id.* § 201.18(f) (requiring the U.S. Copyright Office to keep records related to filings for compulsory licenses).

367. *See supra* Part II.B.2.

368. Such tracking could possibly be done through a mashup creator's IP address, similar to how the recording industry tracks file sharers. *See* Brian Garrity, *Fuzzy Math*, BILLBOARD, July 1, 2006, at 24.

369. Voegtli, *supra* note 82, at 1258.

370. *See* Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner*: Copyright*

by these companies seems likely. Hence, a compulsory licensing system with an "opt out" feature will only provide minimal benefits to mashup creators because media companies would likely exclude from the system a substantial amount of the content mashup creators could use.

While neither altering the length of copyright's term nor implementing a compulsory licensing system will offer any substantial benefits to mashups, achieving a system that seeks to promote mashups would enhance expression. Although not recognized as fair use under the standards adopted in *Campbell v. Acuff-Rose Music, Inc.*, the Court should nonetheless recognize mashups as a form of transformative expression.[371] By altering *Campbell*'s test to better accommodate transformative works, virtually all mashups would receive the protections of fair use.

VII. Reshaping Transformation and Fair Use to Protect Mashups

The Court must modify its approach to transformation and fair use to insure an adequate balance between copyright and the expressive interests of the First Amendment. In *Campbell v. Acuff-Rose Music, Inc.*, the Court stopped short of granting all transformative works fair use protection.[372] As a result, this decision created a situation where works like mashups, which transform original copyrighted materials but do not necessarily do it in a way that criticize the original materials, do not receive the protection of fair use. The Court should alter *Campbell*'s test to (1) treat all works except those making only nominal transformations as transformative, and (2) to treat transformative works as presumptively protected by fair use.

A. Altering Campbell *to Promote Transformation*

1. Finding Transformation in More Works

Several scholars have proposed altering the fair use doctrine to give transformation a more prominent place in determining whether a work constitutes fair use.[373] Nevertheless, these proposals generally limit a finding

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Term Extension and Intellectual Property as Constitutional Property, 112 YALE L.J. 2331, 2338 (2003) (noting how one such company, Disney, has been a strong advocate of increased copyright controls).

371. 510 U.S. 569, 578-81 (1994).

372. *Id.*

373. *See* David Lange & Jennifer Lange Anderson, *Copyright, Fair Use and Transformative Critical Appropriation*, *in* DUKE CONFERENCE ON THE PUBLIC DOMAIN FOCUS PAPER DISCUSSION DRAFTS 130, 130-31 (2001), *available at* http://www.law.duke.edu/pd/papers/langeand.pdf (advocating expanding transformative use to cover socially critical works); Netanel, *supra* note 337, at 376-82 (discussing possible implications of expanding

of transformation to instances where the creator of the transformative work has engaged in "social commentary."[374] Such an interpretation of transformation does go beyond *Campbell* by deeming a larger array of works transformative,[375] but, even so, this interpretation still leaves a large portion of works, such as mashups made for entertainment purposes, outside the protection of fair use. In order for such non-socially critical works to be protected, courts should treat all works that engage in new expression, with the exception of those only making nominal transformations, as transformative.

By applying this interpretation, courts would find most works that make modifications to the original materials transformative rather than infringing derivative works. When a court decides a copyright infringement case, it would examine the allegedly infringing work to see if the copyrighted materials in the work constitute "raw materials" for building new expression.[376] If the creator used the copyrighted materials in such a manner, the type of new expression engaged in by the creator would not matter. In fact, the creator of the allegedly infringing work could have expressed profound social commentary or mere entertainment and the court would nonetheless find transformation in the work. This interpretation of transformation not only provides broader protection for transformative works than currently exists under *Campbell*,[377] but also avoids two problems that occur under proposals that only expand protection to cover works expressing social criticism.

First, extending transformation only to works engaging in social criticism can leave courts to struggle with questions of what type of expression the defendant actually engaged in. In such cases, a defendant may assert multiple reasons why the expression constitutes social criticism, leaving the court to grapple with the question of whether the defendant offered these explanations

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transformative use protections); Tehranian, *supra* note 226, at 1241-43 (proposing the U.S. Copyright Office allow registration of transformative materials, and that such materials would presumptively be protected by fair use); Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940, 1950-53 (2005) (suggesting expanding transformative uses to cover jazz).

374. *See, e.g.*, Lange & Anderson, *supra* note 373, at 130-31 (limiting their application to "transformative critical appropriation" involving "serious social commentary").

375. *Id.* at 131 (noting their proposal would grant protection beyond parody); Tehranian, *supra* note 226, at 1242 (noting under his proposal, "transformative uses" would include much more than just parody).

376. Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)). *Castle Rock* ultimately found no transformation occurred, and did not consider whether the copyrighted items constituted "raw materials" in the infringing work. *Id.* at 142-43.

377. *See supra* Part III.B.3.

as mere "post hoc rationalizations."[378] This creates a situation closely mirroring the problems with drawing distinctions between parody and satire because courts would have to judge what intentions a creator harbored when the creator engaged in the expression.[379] In contrast, not limiting transformation to socially critical works avoids this problem. By finding works transformative regardless of the type of expression engaged in by the creator, courts will not have to determine a creator's intentions in making the new work. Instead, the court will only have to examine whether or not the creator actually transformed the work.

Second, by limiting transformation to socially critical works, courts will often have to judge the worth of a work. A creator may intend a work to contain broad social criticism, but in the eyes of the court the creator may fail. The creator's work might take aim at social phenomena, but the creator may miss the intended target.[380] In such instances, courts would have to determine whether the expression in a work truly constituted social criticism. Although the Court has cautioned that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of a work,"[381] limiting transformative protections to only socially critical works could require judges to do just that. By not limiting the scope of protection to works of social criticism, courts will not serve as an arbiter of the meaning of an expression. Instead, expanding the scope of transformation will render the meaning of the author's expression inconsequential, as courts will only need to examine a work to see if transformation occurred.

Broadening the scope of transformation does not mean that courts will find transformation in every work that modifies existing materials. For instance, if the creator of a new work merely makes nominal transformations, courts would not have to find the new work transformative. Examples of such nominally transformative works include cases of pure piracy that make no transformation, and superficial transformations like changing only a few words in a song while keeping the rest of the lyrics and melody.[382] While changing the scope of transformation eliminates much of the uncertainty currently

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378. *Castle Rock*, 150 F.3d at 142.

379. *See supra* Part III.B.4.

380. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582-83 (1994) (noting the history of whether or not courts found the existence of criticism in the parody *Pretty Woman* as it worked its way through the legal system).

381. *Id.* (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)).

382. *See* Lange & Anderson, *supra* note 373, at 151 (noting transformation could be applied in instances except for the "boldest forms of appropriation through the simplest form of copying"); Rubenfeld, *supra* note 99, at 48 (describing how piracy does not take any "imagination" and is reproduction, not transformation).

plaguing fair use, some uncertainty will remain because courts would still have latitude to determine what exactly constitutes a nominal transformation.[383] Nonetheless, expanded transformation minimizes this uncertainty because the line between transformative and non-transformative will have moved from encompassing only parody to encompassing substantially more works that engage in a wider variety of expression.

2. Presuming Transformation Is Fair Use

The Court in *Campbell* noted that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."[384] The Court described transformative works as essential to "the fair use doctrine's guarantee of breathing space within the confines of copyright."[385] Thus, not only must courts recognize transformation in works that change or add meaning to old materials, but courts should also presume these works constitute fair use in order to fulfill the constitutional purposes of copyright. Indeed, granting such a presumption in favor of fair use for transformative works would protect works "imbued with new expressions that criticize or illuminate our values, assess our social institutions, satire current events, or comment on our most notorious cultural symbols."[386] In order to realize the expressive benefits of transformative works, courts must necessarily grant transformative works a presumption of protection under fair use.

The presumption of fair use for transformative works does not mean that courts would no longer inquire into the other statutory factors of fair use. Certainly, a court could find fair use in non-transformative works through the application of the other statutory factors of fair use.[387] Further, in a case where a court doubts that a work makes anything more than nominal transformations, examination of the other factors would prove determinative in the court's fair use analysis.[388] The presumption in favor of fair use means only that courts

383. *Cf.* Tehranian, *supra* note 226, at 1235 (describing how a proposal limited to finding socially critical works as transformative leaves considerable uncertainty because it is unclear what works courts will find to be transformative given these standards).

384. *Campbell*, 510 U.S. at 579.

385. *Id.*

386. Tehranian, *supra* note 226, at 1242. Although Tehranian is discussing this within a proposal to statutorily recognize transformative works as fair use, the same benefits will accrue under any system that determines transformative works are a fair use. *See* Lange & Anderson, *supra* note 373, at 144.

387. *See Campbell*, 510 U.S. at 578 (noting that all factors of fair use are "to be explored, and the results weighed together, in light of the purposes of copyright").

388. *See* Lange & Anderson, *supra* note 373, at 145 ("We do not suggest that a fair use defense . . . be treated as though it were a matter of fiat; judges in the end will have to examine doubtful cases individually when they arise to determine whether the privilege (or its

will apply the other fair use factors differently, not that courts will no longer apply the other factors.

A presumption towards finding fair use in transformative works rebalances the fair use equation. Courts would no longer apply the fourth fair use factor that relates to the market effects of an infringing work[389] as "the most important" factor in determining fair use.[390] Instead, the first fair use factor that analyzes the "purpose and character" of a work will assume the prominent role in fair use analysis.[391] This factor will assume prominence because courts examine a work's transformative nature as part of the purpose and character of a work.[392] Given copyright's stated purpose in the Constitution to "[p]romote the Progress of Science and useful Arts,"[393] this shift in importance helps fulfill copyright's constitutional objectives. Furthermore, this shift in importance comports with the Court's analysis in *Campbell* that "the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use."[394] Additionally, this shift helps resolve potential conflicts between copyright and First Amendment values. By granting transformation heavy favor in fair use analysis, copyright will serve to promote expression, rather than restricting it to protect a prior creator's market share.[395] In order to fulfill copyright's purpose, as well as enhance First Amendment values, altering the method courts use to weigh fair use is appropriate.

Changing *Campbell* to find transformation in more works and to grant these transformative works a presumption of fair use will help restore balance to a copyright system that has become hostile to expressive creations like mashups. In *Blanch v. Koons*, the Second Circuit appears to have taken an approach toward fair use similar to these proposals.[396] Applying the *Blanch* analysis to transformative works like mashups demonstrates the benefits that judicially

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presumption) is justified in the circumstances there presented.").

389. *See* 17 U.S.C. § 107(4) (2000).

390. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

391. *See* 17 U.S.C. §107(1).

392. *See, e.g.*, *Campbell*, 510 U.S. at 578-79 (asking whether a work is transformative as part of its analysis in the purpose and character of the use); Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998) (analyzing the work's transformative qualities under the first statutory fair use factor).

393. U.S. CONST. art. I, § 8, cl. 8.

394. *Campbell*, 510 U.S. at 579.

395. *See* Tehranian, *supra* note 226, at 1244. Although Tehranian presents a statutory solution, the benefit to the First Amendment is achieved by treating transformative works as a fair use, regardless of the specific means of implementation.

396. 467 F.3d 244 (2d Cir. 2006).

implementing the suggested changes would give to mashups and similar transformative works.

B. Applying a Transformation-Friendly Fair Use Test

1. Blanch v. Koons

In *Blanch v. Koons*, the Second Circuit had to determine whether fair use protected the infringing activities of an "appropriation art[ist]."[397] Defendant Koons "culled images from advertisements" and, after modifying them, incorporated them into a piece of art.[398] The image at issue was a photograph of women's "feet and lower legs,"[399] and Koons admitted to not seeking permission to use the photograph.[400] Koons used the photograph to serve as "fodder for his commentary on the social and aesthetic consequences of mass media," not to criticize or parody the photograph itself.[401] In fact, the court recognized the satirical nature of Koons's work when it held that Koons's use of the picture "may be better characterized for these purposes as satire" because "its message appears to target the genre of which [the photograph] is typical, rather than the individual photograph itself."[402]

Although the *Blanch* court started by citing *Campbell*'s analysis regarding transformation, the court largely departed from *Campbell*'s analysis.[403] The *Blanch* court noted that it had applied *Campbell* in "too many non-parody cases" to only limit *Campbell*'s rationale to parody.[404] Even though the court made such a claim, it failed to cite any such "non-parody cases."[405] After noting that *Campbell*'s parody limitations would not constrain it, the court held that Koons's satirical appropriation constituted fair use.[406] The court determined that so long as Koons had a "genuine creative rationale," appropriative borrowing could constitute fair use even if done for satirical purposes.[407] As a result, when a creator uses appropriated objects as "'raw materials' in the furtherance of distinct creative or communicative objectives, the [creator's] use is transformative."[408] Thus, according to *Blanch*, the

397. *Id.* at 246.
398. *Id.* at 247.
399. *Id.*
400. *Id.* at 248.
401. *Id.* at 253.
402. *Id.* at 254.
403. *Id.* at 251.
404. *Id.* at 255.
405. *Id.*
406. *Id.* at 255, 259.
407. *Id.* at 255.
408. *Id.* at 253. The "raw materials" term comes from *Castle Rock Entertainment, Inc. v.*

underlying expression does not determine the existence of transformative use. Instead, the infringer need only use the appropriated items to further the creation of some new message in order for the new work to receive fair use protection as a transformation.[409]

Blanch represents a marked departure from *Campbell*. In fact, the *Blanch* decision largely ignored the *Campbell* Court's aversion to protecting satire.[410] Further, the analysis in *Blanch* did not base a finding of transformation on the presence of a literary device like parody. Rather, the *Blanch* court examined if the creator used the infringing works as "raw materials" to make something new.[411] The *Blanch* court shifted *Campbell*'s focus away from the type of expression made by the incorporation of infringing materials, and focused instead on whether or not the creator used the materials to further different "creative or communicative objectives."[412] Thus, *Blanch*'s test would find transformation when creators incorporate materials into any new message, not merely messages that criticize the original work.

The *Blanch* court's decision to move towards a more transformation-friendly standard represents an even greater departure from prior fair use cases when one considers the history behind this case. The same court that decided *Blanch* had previously found that a nearly identical act of appropriation by Koons did not constitute fair use. In *Rogers v. Koons*, the court held that no fair use existed in Koons's satirical act of rendering a sculpture based on a photograph.[413] Although the Second Circuit decided *Rogers* two years before the Supreme Court decided *Campbell*, the Second Circuit applied a parody-satire distinction in *Rogers* almost identical to that in *Campbell*.[414] The *Rogers* court noted that "the copied work must be . . . an object of the parody,

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Carol Publishing Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998), which in turn quotes Leval, *supra* note 376, at 1111. Though the term "raw materials" seems to be dicta in *Castle Rock*, the *Blanch* decision appears to place heavy emphasis on the term. It is used twice in the majority decision. The first appearance is a citation to the passage in *Castle Rock* where the term "raw materials" appears. *Blanch*, 467 F.3d at 251-52. The second appearance of the term is in the analysis used to define what constitutes a transformative work. *Id.* at 253. The third appearance of the term is in the concurring opinion where it is also used to help establish what constitutes a transformative work. *Id.* at 262 (Katzmann, J., concurring).

409. 467 F.3d at 244 (majority opinion).

410. *Id.* at 255; *see also supra* Part III.B.3.

411. 467 F.3d at 253.

412. *Id.*

413. 960 F.2d 301 (2d Cir. 1992).

414. *Compare* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81 (1994) ("Parody needs to mimic an original to make its point . . . whereas satire can stand on its own two feet . . . ."), *with Rogers*, 960 F.2d at 310 ("[T]he copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.").

otherwise there would be no need to conjure up the original work."[415] Accordingly, the court reasoned that permitting fair use for satire would leave "no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large."[416] The *Blanch* decision seems to overturn the reasoning in *Rogers* by not only presuming that transformation exists in any activity with different "creative or communicative objectives,"[417] but also by broadly protecting this transformation as fair use, even when the creator makes such transformation for satiric purposes.[418] This broad, transformation-friendly analysis represents not only a shift away from *Rogers* and *Campbell*, but also provides a method to offer fair use protection to other types of transformative expression, such as mashups.

2. Application of Transformation-Friendly Fair Use to Mashups

The Second Circuit's application of a transformation-friendly fair use test to appropriative art demonstrates how the two changes proposed in Part VII.A could protect works like mashups. For instance, in a case involving a mashup, the court would examine the mashup to see if the copyright-protected works constitute raw materials that the creator transformed into something new. The court would not concern itself with the type of expression made in the mashup or if the mashup succeeds in making its point. Instead, the court would only examine whether the appropriated materials serve as components within the mashup in such a way that the mashup transforms the components into some type of new expression. If the mashup uses the materials in such a way, the court would find the mashup transformative. As a transformative work, the court would presume fair use protects the mashup unless the party claiming infringement could rebut the presumption, such as by showing the creator made only nominal transformations. Consequently, most mashups that would have previously infringed a copyright holder's derivative works right would now receive protection under fair use because most mashups make more than nominal transformations.

For example, consider a hypothetical case in which Lionel Ritchie sues the creators of the George Bush/Tony Blair mashup for infringing Ritchie's rights in the song *Endless Love*.[419] The court in that case would examine the mashup to see if the mashup creator uses the song in a way that does more than nominally transform it. In determining this, the court might consider if the mashup creates new expression, if the mashup serves a different function than

415. 960 F.2d at 310.
416. *Id.*
417. 467 F.3d at 253.
418. *Id.* at 253, 255.
419. For an explanation of the Bush/Blair mashup, see *supra* Part II.B.3.

the source materials, or if the mashup comprises a work of creativity or originality.[420] The court would not consider what message the mashup expresses, such as whether the mashup expresses political criticism. Instead, the court would only examine if the mashup transforms Ritchie's copyrighted work into something different. If so, the court would find the mashup transformative and presume fair use offers the mashup protection.

Additionally, consider the mashup *StarLords*, which would appear to engage in substantially less social or political commentary than the Bush/Blair mashup.[421] Here again, a court would only examine if the mashup creator uses the copyrighted works as raw materials and transforms them in more than a nominal way. Although *StarLords* appears to engage in no social criticism, this fact would carry no weight in the court's fair use analysis. The court would only consider whether *StarLords*' creator transforms the mashup's raw materials into something new. If so, the court would find the mashup transformative and give the mashup a presumption of fair use.

Revising fair use to make the doctrine more accommodating to transformative works will provide the protection of fair use to a mashup that would otherwise infringe copyright. This change in the fair use doctrine proves desirable not only because it protects a larger variety of works from suppression, but for several other reasons as well. The proposed changes to make the fair use doctrine more transformation-friendly help rebalance First Amendment values against copyright. Additionally, the proposed changes eliminate the ambiguity of the current parody-satire distinction. Finally, altering the fair use doctrine to protect transformative works clarifies the boundaries between fair use and derivative works. The following subparts examine these three benefits individually.

VIII. Benefits of Transforming the Fair Use Doctrine

A. Promoting Mashups Enhances First Amendment Values

Copyright and the First Amendment often conflict. Although copyright functions to promote expression, many scholars have argued that copyright's current implementation does precisely the opposite.[422] For three reasons, altering the fair use doctrine to better protect transformative works, such as mashups, will help resolve copyright's conflicts with the First Amendment by ensuring that fair use will protect otherwise suppressible expression.

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420. *Cf. Blanch*, 467 F.3d at 251-53 (all these factors are listed as considerations in finding a work to be transformative in the court's analysis).

421. For an explanation of the *StarLords* mashup, see *supra* Part II.B.1.

422. *See supra* Part IV.A.3.

First, protecting mashups enables the creator to have greater freedom in specifically choosing the words and expressions the creator wants to use as raw materials. The Court has previously noted that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[423] Under current copyright law, however, courts routinely prohibit speakers from using particular words if such words infringe another's copyright.[424] Moreover, copyright's reach extends not only to words, but to virtually all other forms of expression as well.[425] Protecting mashups as a form of transformative use allows the mashup creator to use otherwise protected materials, and thereby, to have access to a wider variety of "particular" expression in constructing a new message. The creator of the George Bush/Tony Blair mashup[426] should not have to settle for only saying "George Bush and Tony Blair have strong feelings for each other" in order to comport with copyright. By protecting the mashup with fair use, the creator can convey his own particular expression by incorporating the song *Endless Love* into the mashup without having to fear liability under copyright.

Second, protecting mashups as a form of transformative fair use decreases self-censorship by mashup creators. The uncertainties regarding protection of transformative uses under the current fair use doctrine create a chilling effect that discourages many people from creating mashups.[427] Further, the amateurs who create most mashups lack the resources to either secure permission from copyright holders or engage in a court battle to determine if fair use protects their mashup.[428] As a result, many mashup creators simply forgo creating mashups in the first place.[429] By altering fair use so that courts will find transformation more easily and presume that fair use protects transformative works, copyright will no longer thwart mashup creation. Accordingly, a transformation-friendly fair use standard will eliminate the "prevailing

423. Cohen v. California, 403 U.S. 15, 26 (1971).

424. Rubenfeld, *supra* note 99, at 6; *see also supra* Part IV.B.4.

425. *See* 17 U.S.C. § 102(a) (2000) (containing a list of materials copyright protects).

426. For an explanation of the Bush/Blair mashup, see *supra* Part II.B.3.

427. *Cf.* Netanel, *supra* note 337, at 381 (discussing sampling in general, but the analysis is applicable to mashup creators or any other artist who incorporates copyrighted materials into the artist's own works).

428. *See* LESSIG, *supra* note 11, at 185 (noting the presumption of illegality in copyright "chills creativity"); Hunter & Lastowka, *supra* note 26, at 987-88, 1019 (discussing how mashups are created by amateurs, and how current copyright law acts as a barrier to the creators' expressive endeavors); Netanel, *supra* note 337, at 381 (discussing how copyright chills people from sampling).

429. LESSIG, *supra* note 11, at 185 (noting how the chilling effect means "an extraordinary amount of creativity will either never be exercised, or never be exercised in the open").

uncertainties" of fair use that inhibit mashup creation, thereby leaving mashup creators free to make mashups without fear of liability for copyright infringement.[430]

Third, altering fair use to better accommodate transformative works enhances the marketplace of ideas and promotes democratic discourse. Copyright's incentive system should strive to promote the creation of new expression.[431] Although scholars have questioned whether current copyright law does this effectively,[432] authors and creators may nonetheless receive at least some incentive from the current copyright structure.[433] Altering fair use will only minimally impact this incentive structure, and in the case of mashups, will have virtually no impact on the financial incentives copyright creates.[434] Indeed, a revised fair use test largely preserves the inventive structure of copyright because mashups will seldom serve as a market substitute for the original product.[435]

By altering fair use to protect mashups, additional expression and ideas will enter the marketplace of ideas. The Court recognized the importance of a vibrant marketplace of ideas when it carved out a limited exception for transformative uses in *Campbell v. Acuff-Rose Music, Inc.*[436] Moreover, the Court found that creation and expression of new ideas insures diversity within the marketplace of ideas and allows those within the marketplace exposure to a wider variety of thoughts and expression.[437] Such diversity not only encourages more expression as people engage in continued discourse about ideas within the marketplace, but also helps to ensure that copyright fulfills its "democracy enhancing objectives."[438]

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430. *See* Netanel, *supra* note 337, at 381 (discussing how the lack of transformation protection creates uncertainties in copyright law).

431. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) (noting copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward").

432. *See supra* Part III.A.1.

433. Abramowicz, *supra* note 76, at 327-29.

434. *Cf.* Netanel, *supra* note 337, at 380-81 (explaining how digital sampling and other multimedia manipulation would not impose any greater burden on financial incentives than does the existing compulsory license for recording cover songs).

435. *Id.*

436. 510 U.S. 569, 579 (1994).

437. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1760 (2005) ("If would-be dissenters keep their views to themselves, their ideas will never reach the marketplace of ideas.").

438. Netanel, *supra* note 337, at 382.

B. Resolving the Parody-Satire Quagmire

The parody-satire distinction that the Court used in *Campbell v. Acuff-Rose Music, Inc.* has created doctrinal problems for fair use.[439] This distinction has made it unclear exactly when a court will protect a transformative work, or if a court will even find a work transformative at all.[440] Accordingly, if courts would abolish this distinction and find a work transformative regardless of whether the work constitutes a parody, satire, or something else entirely, courts could eliminate the confusion bred by the parody-satire distinction. Courts can avoid using this ambiguous literary distinction by focusing on whether the appropriated works in a mashup serve as raw materials to create new expression. In so doing, a mashup creator could more easily determine whether a mashup made by the creator will receive fair use protection. Thus, elimination of this ambiguity not only clarifies the fair use doctrine, but also reduces copyright's negative effects on expression.[441]

C. Clarifying Boundaries Between Fair Use and Derivative Rights

A copyright holder's derivative rights often directly conflict with an infringer's claim to fair use.[442] Although the Copyright Act attempts to balance these two competing claims, derivative rights have expanded to the point of almost entirely consuming fair use.[443] A transformation-friendly fair use test, however, would sharply curtail a copyright holder's derivative rights. While this represents a change in the protections copyright offers to copyright holders, courts should nevertheless implement this change not only to promote the expressive values of the First Amendment, but also to follow the language and purpose of the Copyright Act.

The Copyright Act mandates that its fair use provisions apply "notwithstanding" a copyright holder's derivative works right.[444] Further, derivative rights under the Act are "[s]ubject to" fair use.[445] The Act, however, also states that any work that "transforms" an original infringes the derivative rights of the copyright holder.[446] These competing provisions create a

439. *Campbell*, 510 U.S. at 580-81; *see also supra* Part III.B.3.

440. *See supra* Part III.B.4.

441. *See supra* Part VIII.A.

442. *See* LESSIG, *supra* note 11, at 145 (discussing how fair use has been overburdened by derivative rights); Voegtli, *supra* note 82, at 1237 (noting how fair use is the only major obstacle to full derivative rights).

443. Tehranian, *supra* note 226, at 1248.

444. 17 U.S.C. § 107 (2000).

445. *Id.* § 106.

446. *Id.* § 101.

contradiction within the Act itself. The Court has already determined that at least some transformative uses fall under fair use, despite the Act stating transformative uses belong to the copyright holder as a derivative right.[447] Either the right to transform an existing copyrighted work must fall within the scope of derivative rights as the Act states, or the right to transform must constitute a fair use, as the Court held. Because the Act subordinates derivative rights to fair use rights,[448] transformation should fall under fair use, not under derivative rights. Interpreting the Act in this way not only eliminates a statutory conflict between derivative rights and fair use, but also prevents derivative rights from "undermin[ing] the very viability of a transformative-use defense in copyright law."[449]

Contrary to concerns espoused by the courts,[450] placing transformation within the realm of fair use would not eviscerate derivative rights. True, the adoption of a transformation-friendly fair use test would lessen the derivative rights belonging to a copyright holder. Nonetheless, a copyright holder would still have an array of derivative rights even under a different fair use standard, some of which the Act specifically mentions. For example, a copyright holder would still have derivative rights for "editorial revisions, annotations, [and] elaborations," in addition to other minimally transformative changes to the original work.[451] These modifications to the original work would generally comprise only nominal changes that would not receive protection from the proposed changes to transformation and fair use.[452]

IX. Conclusion

The Internet's ability to serve as a digital town square represents a remarkable opportunity for substantial numbers of people to engage in wide and expressive discourse.[453] As digital manipulation technologies increase in affordability, mashups present a unique and effective way for Internet users to

447. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (explaining that transformative works are at "the heart" of fair use's guarantee of creative "breathing space").

448. 17 U.S.C. § 106.

449. Tehranian, *supra* note 226, at 1249.

450. *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) (explaining how allowing broad fair use would leave "no practicable boundary to the fair use defense"); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 379 (S.D.N.Y. 1993) (noting how automatically giving transformative appropriative works the protection of fair use would "eviscerate" protections given to copyright holders).

451. *See* 17 U.S.C. § 101; *see also supra* Part VII.A.1.

452. *See supra* Part VII.A.1.

453. LESSIG, *supra* note 11, at 45.

engage in expression.[454] Nevertheless, this vision of an expressive digital marketplace where people constantly imbue old creations with new expression and meaning may never come to fruition. The potential boon mashups represent to First Amendment values stands at odds with current copyright law. Copyright's heavy emphasis on the promotion of a copyright holder's derivative works rights serves as a major impediment to the legality of mashup creation.[455] Further, the Court's holding in *Campbell v. Acuff-Rose Music, Inc.* heavily limits the ability of an infringing mashup creator to claim fair use based on transformation as a defense.[456] As a result, unless courts alter existing copyright doctrine to better accommodate transformative works, mashup creators will increasingly find themselves and their mashups on the wrong side of copyright.

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454. Hunter & Lastowka, *supra* note 26, at 988.
455. Tehranian, *supra* note 226, at 1249.
456. 510 U.S. 569 (1994).